Supreme Court of the United States.

Case 440, of Dec. Term, 1869.

MARK HOWRAD AND ALS., *Appellants*,

vs.

JOHN V. McCOLLUM AND ALS., *Appellees*.

Cases 344 & 406, of Dec. Term, 1869.

JOHN V. McCOLLUM AND OTHERS, *Appellants*,

vs.

MARK HOWARD AND OTHERS, *Appellees*.

Cross-Appeals from the Circuit Court for the District of Iowa.

ABSTRACT OF PLEADINGS, PROOFS AND ARGUMENT, FOR HOWARD AND OTHERS.

By JAMES GRANT.

Globe Steam Print, Davenport, Iowa.

Supreme Court of the United States.

December Term, 1870.

JOHN V. McCOLLUM, FREDERICK FOSTER, ET. AL.,
[440.] *Appellants,*

vs.

MARK HOWARD, AND OTHERS, *Appellees.*

MARK HOWARD, AND OTHERS, *Appellants,*
[344. 406.] vs.
JOHN V. McCOLLUM, *Appellee.*

Appeal and Cross-Appeal from the Circuit Court for the District of Iowa.

Argument for Appellees and Cross-Appellants.

STATEMENT OF THE CASE.

This cause is in three records. John V. McCollum, and others, took an interlocutory appeal, No. 344, December Term, 1869, which was dismissed; the record in that case was continued, and, by agreement, made part of the record; in the second case, which is an appeal from final decree, No. 406, December Term, 1869, new No. , and No. 440, new No. [illegible], of this term, which latter is simply the record of the cross-appeal. The first record is essential to the understanding of the case.

ABSTRACT OF PLEADINGS AND PROOFS

In the original case of Howard vs. the Rail Road Company.

Mark Howard and others, holders of certain bonds of the cities of Davenport, Muscatine, and Iowa City, and the counties of Scott, Muscatine and Johnson, which had been

guaranteed by the Mississippi & Missouri Railroad Company, filed their bill in equity, claiming as judgment and other creditors of the Mississippi & Missouri Railroad Company, that the said Railroad Company was insolvent, and having sold its franchises and all its property, was about to go out of practical existence, and the bill prayed that a certain part of the proceeds of a private sale of said Railroad Company, which was about to be divided among the stockholders, should be subjected to the payment of the claims of the plaintiffs, as creditors. The bill was not a general creditors bill, but a bill by particular creditors, for themselves alone.

As this part of the cause has been fully heard and determined by the Court, we shall only state so much of it as is required to understand the questions now before the Court, and we shall state the facts, instead of the pleadings in detail.

The Mississippi & Missouri Railroad Company was incorporated in 1852, under the general laws of Iowa, to build a railroad from Davenport to Council Bluffs. In the execution of this design in 1865 it had built about 180 miles of railroad, then in operation, and had executed, in addition to the guarranty of about $450,000 of the municipal bonds above specified, five mortgages on various parts of its road:

1. First mortgage on eastern division, Davenport to Iowa City, and all its rolling stock, dated 1st July, 1855, first record page 178, for..... $1,000,000
2. Second mortgage on the same division, dated 1st July, 1856, record 182..... 400,000
3. A mortgage on the Oskaloosa division, from Wilton Junction to Washington, dated 1st July, 1856, record 186..... 590,000
4. A first land grant mortgage, on the road from Iowa City to Council Bluffs, including a grant of land, but not its rolling stock, dated 8th May, 1857, record 199..... 3,612,000
   This amount is stated in E. Cook's evidence in foreclosure suit to have been $3,617,000.
5. A second land construction mortgage on the

whole road and rolling stock, dated 10th December, 1861, record 154, for..... 691,000

The Company has issued stock to the amount of $3,452,500

In 1865, the corporation was unable to pay the interest on its bonds, became embarrassed and insolvent. At a meeting of its stock and bond-holders, held in New York on 18th and 20th October, 1865, (344 record page 253, 131) it was resolved to sell the road to the Chicago & Rock Island Railroad, a corporation created by the laws of Illinois, for the sum of $5,500,000, and to divide the proceeds, according to the following scale:

1st mortgage bonds par and interest.....	$1,256,490
2d mortgage, 80 per cent.....	230,000
3d mortgage, Oskaloosa division, 62½ per cent...	416,212
4th Land grant construction mortgage, Iowa City to Council Bluffs, 70 per cent.....	2,714,635
5th second construction mortgage, 30 per cent...	208,129
Capital stock, 16 per cent.....	552,400
Balance to pay foreclosure expenses, page 41...	32,134
	$5,500,000

Messrs. B. Wilson, G. W. Stanton, and John Elliott were appointed a committee to arrange the mode and terms of payment and the details of the sale, authorized at said meeting, and they were instructed to make an arrangement with some Trust Company to receive the bonds and stock of the parties assenting, and issue certificates therefore, setting forth what the holder was entitled to receive. (No. 344 record, page 32.)

In pursuance of these proceedings and to carry them into execution, a contract was executed, (344, record page 36) between the Mississippi & Missouri R. R. Co. and the Chicago & Rock Island R. R. Co. whereby Mississippi & Missouri Co. was to foreclose, with all possible dispatch, the mortgages on its road, so that the purchasers should be able to convey a perfect an unincumbered title to such corporation in Iowa as the C. & R. I. Co. should designate, and the C. & R. I. Co. was to incorporate a company in Iowa to purchase said Mississippi & Missouri property for the five and a half millions, and complete the road to Des-

Moines: and the Mississippi & Missouri Co. agreed that whoever purchased should convey to said Company so created. The Rock Island Company was, if possible, to consolidate with such to be created Iowa Company, and if consolidated, was among other things to pay for said Mississippi & Missouri property in five and a half millions of consolidated bonds, bearing seven per cent. interest from 1st December, 1865, on which day the Rock Island Co. was to have possession of the Mississippi & Missouri R. R.

And a large majority of all classes of bondholders, and stockholders, in execution of the resolutions of 20th October, 1865, signed an agreement, called the Peter Myer's agreement, (344 record, page 39) reciting the terms of sale and scale of stock and bonds of 20th October, 1865, whereby the assenting bond and stockholders ratified said agreement and confirmed the authority of the committee, (Stanton, Elliott & Wilson) consented to the foreclosure of the mortgages and the sale under the foreclosure, and agreed to surrender their bonds and certificates of stock to the Union Trust Co., to be held by said Co. as the agents of the committee, to be used by the committee in carrying out the foreclosure. The committee were to foreclose the mortgages and convey the property, after such foreclosure, according to said agreement for the five and a half millions of bonds, and to divide the same according to the scale already recited, and if anything remained to divide it among the assenting stock and bondholders, according to the same scale, after discharging the expense of foreclosure. They were to receive the bonds, scrip and stock of the assenting parties, through the Union Trust Co., and to issue through it a proper receipt showing what the holder was entitled to receive.

The certificate or the receipt of the Trust Company has on the back the substance of the agreement to sell and the scale price. 344 record, page 41, and reserves for expenses of sale $32,134.

The holders of nearly all the various classes of bonds and stock, signed this agreement, deposited their bonds and certificates and received the Trust Co.'s certificates. (E. Cook's deposition, 344, record page 57.)

The committee proceeded, as soon as the requisite number of bonds and stock assented, to the foreclosure. F. P. James & Co., holding nearly $600,000 of the bonds of the last class, being dissatisfied with the scale of these bonds, refused to assent and commenced a foreclosure suit on their mortgage in the U. S. Circuit Court for the District of Iowa. The Chicago & Rock Island R. R. Co. bought out F. P. James & Co., (406 record, page 37,) at 45 per cent., and $16,000, and one half the sum reserved for foreclosure expenses, in February or March, 1866, and assented to the Peter Myer's agreement and the committee having the control of all classes of ~~funds~~ proceeded with the foreclosure. The Trustees of the other mortgages, came in and filed a cross bill, and there was a final decree of foreclosure May term, 1866. (344 record, page 55, E. Cook's deposition and decrees interlocutory and final, 344 record, pages 235, 236, 246.)

The sale under the foreclosure suit took place on 9th July, 1866, and the property was disposed of to the new Company, which had been created in Iowa, the Chicago, Rock Island & Pacific R. R. Co., as follows:

The property under the first and second mortgages for	$1,000,000
Under the third or Oskaloosa	300,000
Under the fourth or first land grant	800,000
Making a total of	$2,100,000

And nothing under the last mortgage.

Howard & Webber filed their bill on the 9th July, 1866, to subject the stockholders share of said sale of 1st Nov. 1865 to the payment of their claims, before any payments should be made to the stockholders, making the city of Davenport, the Mississippi & Missouri Co., the committee, Stanton, Elliott and Wilson, the Chicago & Rock Island, and the new company, the Chicago, Rock Island & Pacific R. R. parties. Other creditors were allowed by them to come in without objection. The defendants, Stanton, Elliott and Wilson, answered, setting up as a defence that the stockholder's scale was a gift from the bondholders, and could not be held for the Company's debts. The Chicago, Rock

Island & Pacific R. R. Co. answered, admitting the purchase under the foreclosure, for $2,100,000; that Stanton, Elliott, and Wilson were appointed a committee to carry out the terms and mode of sale, and that a large amount of bonds and stock were surrendered to them, and that the C. R. I. & P. Co. were to issue the five and a half millions to be received by said certificate holders for their *pro rata* shares, and averred they were ready and willing to deliver the same on the surrender of the said certificates.

They set up that they had contracted with Stanton, Elliott & Wilson to perform their duties as such committee; that the stock certificates were issued to bearer, therefore negotiable, and claimed that they should be made parties to the suit. Set out, that they had no defence to make, and interposed an answer to protect itself in the position it occupied, and asked the Court to make such decree as would protect them. (See 344 Record, pages 22, 23.)

On hearing, the Court decreed that the plaintiffs in that suit, Howard, Weber and others, were entitled to be paid out of the stockholders' fund, 16 per cent., and divided the money and bonds, specifically, to each plaintiff, and subrogated the shareholders of the Mississippi & Missouri R. R. Co., and their authorized agents, to the guaranteed bonds, coupons and judgments of the plaintiffs, and the receiver was to take an assignment of the same and transfer the same to the authorized trustees or agents of said shareholders. (344 Record, pages 111, 112, and 113.)

From this decree Stanton, Elliott & Wilson and the Chicago, Rock Island & Pacific R. R. Co. appealed, (344 record page 115) and the decree was affirmed in this Court.

Railroad Co. vs. Howard, 7 Wallace, 392.

When this decree was appealed from by the Chicago, Rock Island & Pacific Railroad Company, and Stanton, Elliott & Wilson, they had the option to stay proceedings by giving an appeal bond in $800,000. This they declined, and filed a bond of $500,00 to cover cost, (see record of 344, page 114) which by agreement is part of the record in 406, (see page 142.) This was at the May term of the Circuit Court, 1868. In July, 1868, B. F. Allen, the receiver appointed by the decree, applied for the bonds and cash

alluded to in the decree, and the Chicago, Rock Island & Pacific R. R. Co. refused to deliver them to him. An attachment was applied for at August rule day, continued to September, then to October Court 1868, when Frederick A. Foster, who had at the instance of David Dows, a director in the Chicago, Rock Island & Pacific Rail Road Company, bought of a person to him unknown $10,000 of the non-assenting bonds of the Mississippi & Missouri Co., and brought a suit in New York to delay the enforcement of the decree, filed his bill in the Iowa Circuit Court, (record page 129) to arrest the execution of the decree of the Court below, until the cause could be decided here. Foster had first tried in the New York courts to enjoin the defendants from executing the decree of the Circuit Court. (Record of case 344, page 125.)

Foster claimed, that he was a holder of ten bonds, under the 4th mortgage, on a part of the road from Iowa City to Council Bluffs, under which $3,612,000 of bonds, or thereabouts had been issued, and which were scaled at 70 per cent., and that he had never assented to the scale of 20th October, 1865, and he believed the prior holders of the bonds had not assented to the sale; he insinuates rather than alleges that the plaintiff, Howard, had seized the proceeds of the foreclosure sale ; says he has brought a suit in the New York courts to prevent the payment of the fund into the Iowa Circuit, and simply asks of the Court below to delay the distributions of the fund, until this Court should decide the cause of Howard et. als., then pending before this court.

Foster's bill was filed 27th October, 1868, (record 132;) on 28th October the Chicago, R. I. & P. Co. paid over the fund to Allen, (see record of 344, page 247,) and on 29th October Foster had leave to file his bill and the distributions of the fund ordered to be delayed, until the determination of the appeal, or the further order of the court, and if the cause was not decided by the next term plaintiffs might move to rescind the order of delay. (Record of 344, page 248.)

This Court affirmed the decree in Howard case in February, 1869.

ABSTRACT OF PLEADINGS AND PROOFS

In the case of McCollum, Foster, and others.

On the 10th of April, 1869, after the affirmance of the decree in this Court, a new claimant intervenes: John V. McCollum (344 record, page 249) setting forth, in a petition, that he is the owner of eighty-four one thousand dollar bonds, three five hundred dollar bonds, and twenty-eight thousand dollars of coupons, detached from other bonds, secured by mortgages, issued by Mississippi & Missouri Company, which are wholly unpaid, and that the fund in Court was derived from the mortgage sale of the premises, and that he had a prior lien to Howard and others, and praying that he might be paid, before Howard and other general creditors. On the 15th of April, 1869, (record of 344, page 253) Joshua Bardwell, claiming that he owns five bonds of the Mississippi & Missouri, secured by the 4th mortgage of 8th May, 1857—the first land grant mortgage on the road from Iowa City to Council Bluffs,—and one bond, secured by the mortgage of 14th December, 1861, second land grant, making, with interest, about nine thousand dollars: that the fund in Court is part of the proceeds of the sale of said road under said mortgages, that he never has assented to the sale made by the company on 1st November, 1865, in pursuance of the stock and bondholders meeting and has a prior lien on the fund in Court.

On the 15th of May, 1869, during the term of the U. S. Circuit Court, H. S. McComb, holding one bond of $500, for interest on bonds of first land grant mortgage, and a scrip for $252,50 on the second land grant, files a similar petition, claiming he has a lien on the fund in Court, in preference to the plaintiffs, and asking that he may be paid before the plaintiffs. (Record of 344, page 260.)

The Circuit Court, (record of 344, page 267) set apart $200,000 to answer to the claims of Foster, McCollum, Bardwell & McComb, and ordered the rest of the money, $400,000, to be distributed according to the original decree. Foster, Bardwell, McCollum & McComb were allowed until 1st July to file a consolidated bill, setting their claims up more specifically, but not any other claims then those held

by them. To this bill Howard and others had leave to answer by 1st August, 1869, and the case was to proceed after that as ordinary cases. From this interlocutory decree McCollum and others appealed, (record 344, page 269.) The appeal dismissed at the last term; and from this stage of the proceedings the record is entitled John V. McCollum and others vs. Mark Howard and others, No. 406, of docket of December Term 1869.

The consolidated bill was filed 5th July, 1869, (406 record page 1) and repeats the history of the Miss. & Mo. road, as already given; claims that Foster owns ten one thousand dollar bonds, of the first land grant construction mortgage, 8th May, 1857. That McCollum, (record 406, page 22) owns eighty one thousand dollars, first land grant construction mortgage, 15 income bonds of same mortgage, one thousand dollars each, 2 five hundred dollar bonds of second land construction bonds, making in all $98,000, and 800 coupons, detached from bonds, the numbers of which are given, making $28,000 in coupons. Bardwell claims 5 one thousand, and 1 five hundred dollar bond of first land grant mortgage, and 1 one thousand dollar second construction bond, making $6,000, and McComb claims 1 five hundred dollar bond and 1 scrip $250, making $750, second construction mortgage. All these bonds and scrips call for interest from 1st May and July, 1865, (record 406, pages 5 and 6.)

The bill sets out the decree of Howard and others in their suit, and sets out the foreclosure sale on all the mortgages, on the 9th July, 1866, that at said sale the aggregate bids were $2,100,000, but totally omits to say, what amount was bid on the mortgages, under which they held bonds; that the aggregate bid was nominal only, and the real amount, agreed to be bid, was five and a half millions, by the purchaser, that the $2,100,000 bid was not paid, but the trustees gave the officer a receipt for the same, without payment, the same being treated as part of the five and a half millions of dollars, which it had been agreed should be paid for the property.

The bill sets up the agreement and sale of 20th October, 1865, and 1st November, 1865, of the assenting stock and

bondholders, for five and a half millions of dollars, to be paid to those who assented, at a fixed scale on each mortgage. The bill claims that McCollum, Foster, Bardwell and McComb, have a prior lien on the fund in Court, over Howard and others, by reason of the foreclosure, and if they are not entitled to a prior lien, they claim that they are entitled to come in and claim as general creditors, and divide with the plaintiffs.

Howard and others answered this bill on 21 July, 1869, (record of 406, page 11,) admitting the mortgages of 8th May, 1857, and 10th December, 1861, under which McCollum and others claim, and admitting the foreclosure sale, under all the mortgages, making the record in the foreclosure suit and their own suit a part of their answer to this suit.

They set up these proceedings in full, and answer that they show the amount of the foreclosure sale was $2,100,000; they deny that the sum of five and a half millions was agreed to be paid under the foreclosure suit. They deny that it was the understanding that the purchaser at the foreclosure sale was to pay five and a half million dollars; they deny that the $2,100,000 bid was not paid. They say it is true, there was no payment to the officers selling, by the purchaser or the trustees, (meaning the trustees under the mortgages,) plaintiffs in the foreclosure suit, but there was a payment in behalf of the purchaser to the trustees. They deny that the sum bid was treated by the purchaser as part of the five and a half millions, which it had been agreed should be paid for the property. They denied that the trustees had never had in their own hands any of the moneys arising from said sale. They deny that all of the disbursements which had been made to the bondholders entitled thereto had been made by the Chicago, Rock Island & Pacific Railroad Company. They deny that there was an agreement by the Chicago, Rock Island & Pacific Railroad Company or any other persons to bid at the foreclosure sale, five and a half millions for the property.

The defendants further answered, that at the foreclosure sale on 9th July, 1866, the Chicago, Rock Island & Pacific

Railroad Co. purchased the first division of the said road and its rolling stock and machinery for one million of dollars; the Oskaloosa division for three hundred thousand dollars; the land grant or construction division, under the mortgage of 8th May, 1857, for eight hundred thousand dollars; which purchases were separate and distinct for each parcel, exhausted all the property sold, and there was nothing left to apply on the 2d construction mortgage, and there was no bid or sale on account thereof; that the amount applicable to the land grant mortgage of 8th May, 1871, was eight hundred thousand dollars; that the Chicago, Rock Island & Pacific Railroad Co. paid no money on the day of sale, but an arrangement was made to pay the several bids, less the costs, to the trustees on the mortgages in New York, and it was so done. The Chicago & Rock Island Railroad Co. loaned to the Chicago, Rock Island & Pacific Railroad Co. the money to pay the trustees on the mortgages the amount of the bids. The committee, Stanton, Elliott & Wilson, through the trust company, were in possession of the great bulk of the bonds secured by the several mortgages, and an arrangement was made that they were to deliver to the Chicago, Rock Island & Pacific Railroad Co. these bonds, and the Chicago & Rock Island Co. agreed to pay the Union Trust Co. certificates (for the scale price), and to furnish the trustees in the mortgages the money to pay such bonds as had not been deposited with the trust company, for Stanton, Elliott & Wilson, the committee of the assenting stock and bond holders," that these facts fully appear by the testimony of E. Cook, in the original suit of Howard, all the evidence in which the defendant's make part of their answer.

The defendants deny that any arrangement was made, on or about 20th October, 1665, between some of the stock and bond holders, in which it was agreed that a portion of the proceeds to be realized from the foreclosure sale, which was, if right, applicable to the payment of the bonds, should be withheld and improperly applied to the payment of the stockholders in said company, by which the plaintiffs, Foster, and others, should receive less than the par value of their bonds. They deny that the bonds held by McCollum

and others never assented to the terms of the sale; they admit that they personally may not have been parties to any agreement, but aver that they were not the holders of the bonds, until long after the foreclosure decree. They deny that the holders of said bonds now claimed by McCollum and others, were never parties to the agreement of sale by which the bondholders agreed to accept less than their par value. They deny that many of the bondholders have accepted the sums provided by said agreement and foreclosure sale. They deny that neither McCollum and others, or the prior holders of the said bonds have not assented to the terms of said private sale, nor waived ther right to demand payment in full. They deny that the fund in the hands of the receiver, held by him under the order of the Court, is a part of the mortgage sale, or in any way connected there with; aver that the whole sum arising from the mortgage sale has been paid over to the trustees in the mortgages, and has been distributed by them or their agents, or is now held by them in trust for those who have not received it. They deny that Foster or McCollum, or Bardwell or McComb are the *bona fide* owners of the bonds claimed by them, and deny that the holders thereof have never assented to the agreement by which they were scaled. They aver that all of said bonds and coupons are really the property of the Chicago, Rock Island & Pacific Railroad Company, and are held by Foster and others in trust for them, and that they have been paid and satisfied by an agreement referred to in Howard's bill. They say that 200 of the 800 coupons claimed by McCollum as belonging to certain bonds of the Mississippi & Missouri Company, are not signed by the officers of the Company, and of no validity detached from a valid bond. They aver that said coupons belonged to certain bonds belonging to the Chicago & Rock Island Railroad Company, and were in their possession, and detached from the bonds, when the bonds themselves were surrendered to the Union Trust Co., and subjected to the terms of sale of 20th October, and 1st November, 1865, and after payment and satisfaction of the bonds from which they were detached were put in circulation by said Company, or its successor the Chicago, Rock Island & Pacific Rail Road Com-

pany, contrary to equity, said coupons being fully paid and extinguished.

The defendants deny that Foster and others have any claims on the fund in Court, or any right thereto either as prefered or general creditors.

After denying all the allegations of the bill adverse to the defendants' claim, Howard and others set up affirmatively the facts already disclosed as to the private sale of the Mississippi & Missouri Road, by resolutions of 20th October and contract of 1st November, 1865, the scale price of the bonds, the per cent. allowed on each class, 70 per cent. on the first land grant and 30 on the second, and 16 per cent. to the stockholders, the appointment of Stanton, Elliott & Wilson to arrange the terms and manner of sale, and to procure a foreclosure so as to get a good title against the non-assenting stock and bondholders. The contract of the assenting stock and bondholders with Stanton, Elliott & Wilson, to assent to the terms of sale and division of the proceeds according to the scale price, called the Peter Myers agreement; the creation of the Chicago, Rock Island & Pacific Railroad Co., by the Rock Island Company, which was to become the purchaser; the foreclosure proceedings and sale, in separate parcels under each mortgage, and the amount, the provisions in the decree of foreclosure, that all bondholders must present their claims under the decree in two years from the 9th July, 1866; the giving of the required notice under the decree, and the failure to present the bonds of Foster and others within the time barred their claims forever.

That after the foreclosure sales the trustees of the mortgages and the committee or trustees of the stock and bondholders assenting to the sale under the Peter Myer's agreement, 1st November, 1865, authorized the Chicago, Rock Island & Pacific Railroad Co. as ther agents to distribute the proceeds of the foreclosure sale, and to deliver to the assenting stock and bondholders their share of the proceeds of the private sale of 1st Nov., 1865. That the said Chicago, Rock Island & Pacific Railroad Company, in making the distribution under the foreclosure sale, required the bondholders to surrender their bonds absolutely. That

to enable the Chicago, Rock Island & Pacific Railroad Co. to divide the fund with the assenting bondholders, the Trust Company, and Elliott, Stanton & Wilson loaned them the book containing the list of the assenting stock and bondholders, and the Chicago, Rock Island & Pacific Railroad Company having refused to surrender said book, the defendant's answer as to the number of assenting stock and bondholders from information. That in the suit by Howard and others vs. Davenport and others, which seized the stockholders' share of the private sale, the Chicago, Rock Island & Pacific Railroad Company, by Ebenezer Cook, their Secretary, filed an account, verified by oath, (304 Record, 63, 64), that the Chicago, R. I. & P. Railroad Co. had paid all the outstanding bonds, scrip and interest on all the mortgages of the Mississippi & Missouri Railroad Co., according to the scale provided by the terms of sale of October and November, 1865. If that account was true, all the plaintiffs' bonds had assented to the terms and been paid. The defendants aver, that while they know some of the bonds had not assented to the terms of sale and had not been paid that amount does not exceed $174,500, which were scaled at $128,136,31, which sum the Chicago, Rock Island & Pacific Railroad now has on hand, if not paid out in redeeming said bonds. The defendants further answered that when the Chicago, Rock Island & Pacific Railroad Company paid the assenting bondholders, they retaining interest on $4,750,487 of the bonds paid out, for three months, making $83,133,52, which sum was retained to meet contingencies arising out of the Howard suit and non-assenting bondholders. That the Chicago, Rock Island & Pacific R. R. Company agreed to defend the Howard suit without cost to the trustees, and they held both the $128,136.31, and $83,133.52, making $211.269.83, which is now in possession of the Chicago, Rock Island & Pacific Railroad Co., applicable, if they are entitled to it, to the claims of the non-assenting bondholders, and more than sufficient to pay all the non-assenting bonds and interest. That if the said company has paid assenting bonds and neglected to take up the coupons past due, they alone are liable therefor, and the holders have no claim on the fund in Court. The

defendants set up a matter of law against the claims of McCollum and others.

1. They have no lien on the fund in Court, as mortgagers, the mortgaged property being sold, and the proceeds being delivered to the trustees, they must look only to them for the money, their time to do has elapsed and their right barred.

2. They have no lien on the fund in Court, because it was derived from the private sale of the assenting stock and bond holders, not from the foreclosure sale, and no bondholder has any right to any part of it unless he assented to the sale.

3. They have no right, as general creditors, to come now and divide the fund with Howard and others, because Howard and others, by their superior diligence, must be paid. They have no right to the fund as general creditors, because the fund was raised by the act of a large majority of the assenting bond and stock holders, and it was provided that it should be divided solely among those assenters. The bondholders, for whose benefit it was made, cannot, by refusing assent to its terms, get more money than those who did assent.

4. The funds now in the hands of the Chicago, Rock Island & Pacific Railroad Co. are sufficient to pay the whole claim of the plaintiffs, if they have any.

The Chicago, Rock Island & Pacific Railroad Co. answered (Record, case 406, page 24).

This answer admits the mortgages, the foreclosure sale, the organization of the Chicago, Rock Island & Pacific Railroad Co., the purchase at the foreclosure sale and consolidation with the Chicago & Rock Island Railroad Co.

Denied that any other sum was agreed to be paid at the foreclosure sale than the $2,100,000 bid: denies that the $2,100,000 was not paid; denies that it was treated as part of the five and a half millions, which it was agreed should be paid for the property; denies that the trustees in the several mortgages never had in their hands any of the moneys arising from the foreclosure sale; denies that all disbursements have been made to the holders of the bonds by

defendant applied on the five and a half millions; denies that the defendant ever agreed to pay five and a half millions for the title acquired by virtue of said sale.

Admits this agreement of purchase of 20th Oct. and 1st Nov. 1865, the foreclosure and sale; says that the purchaser at the foreclosure did not get an unincumbered title, and that said Chicago & Rock Island Co. was discharged from its contract of purchase, and has expended large sums of money in perfecting its title to the property; says it has no knowledge of plaintiff's claims in the consolidated bill, and requires strict proof thereof, but on information and belief; admits that the bonds claimed by plaintiffs never were surrendered under the agreement of 20th Oct., 1865, but says the holders were parties to the foreclosure suit by their trustees, and are only entitled to their *pro rata* share of the proceeds of the foreclosure, and denies that the defendant is liable to pay, or that the plaintiffs have any right to the fund in this Court.

Replications were filed to these answers, and the cause was tried on the evidence adduced.

The defendants, Howard and others, filed an addition to their answer, (record 406, page 27,) that the Chicago, Rock Island & Pacific Railroad Company had agreed in writing to pay the bonds claimed by the plaintiff, McCollum and others, and praying the Court to order said Company to pay this claim, as well as the costs arising out of this bill. To this answer there was no replication.

PROOFS.

In stating these, we propose to state the effect of the evidence rather than the details of it.

All the records of both causes, the Howard suit and the foreclosure suit, were read; all the contracts and agreements referred to in the bill of Howard were read. The history of the cause of Howard and others vs. Davenport and others, down to its final decision is so familiar to the Court that it requires no repitition.

Foster's Bonds—When and how he acquired them.

It appears from the evidence of John Elliott, who testi-

fies (406 record, page 92) that at the time of the Foster suit the committee, and the Chicago & Rock Island Railroad Company desired to postpone the distribution of the 16 per cent. under the Howard suit, and hardly knew how to accomplish it. That Mr. Tracy, the attorney of the Chicago & Rock Island Railroad Company, desired to purchase as many of the non-assenting Mississippi and Missouri Rail Road Company's bonds as possible. That they, the Chicago, Rock Island & Pacific Railroad Company, had only purchased or were responsible for the purchase of the $10,000 of bonds sued in Foster's name, and they wanted more bonds. That the object of the Foster suit was to prevent the disposition of the funds in the Howard suit; and Elliott produces a letter of Mr. John P. Cook, another attorney of the Chicago, Rock Island & Pacific Railroad Company, dated 1st November, 1868, in which he states that such was the object and it was successful. Elliott states that the market value of Foster's bonds, two years before, was 53½ per cent., and they did not improve any after that.

Frederick Foster testifies (406 record, page 115,) that he is a commission merchant, not engaged in the business of buying bonds; that he purchased these bonds and paid their par value and interest, on the 29th of July, 1868, (the final decree in the Howard case was the May previous) upon the recommendation and advice of Mr. David Dows, that it was a good purchase; that Mr. Dows was a director in the Chicago, Rock Island & Pacific Railroad Company and Foster's particular friend; that Foster knew the bonds were defaulted and would have to be sued; did not enquire about their market value; took Dows word that they would be worth all they had paid for them, and was perfectly satisfied with Dows' word, without making enquiries, though he knew they must be sued, Dows told him where he would have to sue; then sent them to Withrow, by advice of Dows, as his attorney, in New York; paid no attorney's fees and no Court expenses: expects to pay; bought the bonds of one Cox, don't know him or where he lives; was told by Dows, director in the Chicago, Rock Island & Pacific Railroad; he knew very little about the

bonds, bought them on Dows recommendation, but never bought a dishonored bond before on his recommendation; don't remember details of conversation with Dows; made very few enquiries, bought them on Dows' recommendation. Did not come in contact with Cox, did not see him; don't know the broker, who negotiated the sale; Dows recommended him and Foster does not know his name; Dows told me about the bonds, and that the gentleman would get the bonds of Cox, who Foster understood was the owner; met the man in the street, who negotiated the purchase; is on very friendly terms with Mr. Dows.

The McCollum Bonds and Coupons.

The allegations of the answer that these bonds were received by the Chicago, Rock Island & Pacific Railroad Company, at the scale price while they were acting as the agents of the committee, to pay them the scale price is admitted, without proof:

"It is agreed by the plaintiff, McCollum, (record 406, page 35,) that these bonds, at the time of the sale of the Mississippi & Missouri Railroad property, were the property of one T. C. Durant; that he held them on the 1st Aug., 1866, and after the execution of the contract between the Stanton committee and the Chicago, Rock Island & Pacific Rail Road Company. Durant threatened to resist the confirmation of the decree of sale under the foreclosure, because his bonds were excluded, (by the notice of the committee) from assenting to the terms of sale, (the Peter Myer's contract; that the Chicago, Rock Island & Pacific R. R. Co. requested Dows, one of their directors to buy them, to prevent any objection to the confirmation of the decree; that he bought them for that Company for $54,200, (just the scale price, 70 per cent. and interest) to date, and said Railroad Company held them until 27th March, 1869.

That on the 27th of March, 1869, (after the affirmance of the Howard judgment, 406 record, first part, page 35, as to coupons and 35 and 36 as to bonds,) John F. Tracy, as the agent of the Chicago, Rock Island & Pacific Railroad Company, sold these bonds and the 800 coupons cut from other

bonds, to his brother-in-law, John V. McCollum, at 50 per cent. of the amount due, and took his note payable in three years therefor.

That these 800 coupons were cut off of 800 bonds of the Mississippi & Missouri Railroad Company, which were hypothecated by the Mississippi & Missouri R. R. Co. to the Chicago & Rock Island R. R. Co. prior to the 23d December, 1865, for a loan of $500,000. On that day, the Chicago & Rock Island Railroad Company took them, with these coupons, in, at 62½ per cent. that in payment of the debt, with an agreement, (see depositions of Elliott, Wilson, and Stanton, that they would assent to the Peter Myer's agreement, see Wilson's deposition, record 406, page 88,) assent as holders of these bonds to the terms of the sale of 20th October, 1865. That on the 21st January, 1866, the Chicago & Rock Island R. R. Company, as holders of these 800 bonds, signed the Peter Myer's agreement, and after the release of the equity of redemption in the loan, on 23d December, 1865, and before 21st January, 1866, without any notice to Stanton, Elliott & Wilson, the committee, or to Mississippi & Missouri Railroad, cut off these 800 coupons. (See record 406, pages 34 and 35, and depositions of Stanton, Elliott & Wilson.)

200 of these coupons are not signed by the officers of the corporations.

That on 21st July, 1866, the Chicago & Rock Island Co., as holders of these bonds, signed the Peter Myer's agreement. (406 record, page 34.)

The Bardwell & McComb Bonds.

H. S. McComb (see his deposition, 406 record, page 121): That within a few months of the taking of his deposition, October, 1869, he placed his bond and scrip in the hands of Ebenezer Cook, a director of the Chicago, Rock Island & Pacific Railroad Company, for collection. That a few months before, and therefore after the decree of the Howard case, May 1868, he placed Bardwell's bonds, in the hands of the same person, and received in both cases, a receipt of Attorneys Cook & Drury for them. That he knows nothing about this suit of intervention, or of Polk, Hubbell

& Beacroft, who brought suit on Bardwell's bonds, or Nourse & Kaufman, who brought his own suit. That he knows nothing of the appeal cause ; gave Ebenezer Cook unlimited authority and ratifies what he does. Has paid no fees or cost of any kind.

Evidence as to the Sale under the Foreclosure Suit.

It is conclusively proved by the evidence of Elliott, (record 406, pages 40, 88, 121,) Stanton, (record 406, pages 46 and 60.) Wilson, (pages 47 & 73,) that there never was any agreement to bid five and a half millions at the foreclosure sale. That the agreement of 20th October, and 1st November, 1865, was an agreement for a private sale of the road, its property and franchises, and that the foreclosure sale was resorted to, as one of the means to enable the trustees of the stock and bondholders, who signed the Peter Myer's agreement, to convey a clear title to the purchaser. (If all the stock and bondholders could have been found and had assented to the sale, there would have been no occasion for a foreclosure.)

At the time of the foreclosure sale on the 9th of July, 1866, approached the Chicago, Rock Island & Pacific R. R. Co.; and its officers desiring to have the foreclosure conveyance amicably to themselves, agreed to bid at the sale as high as five millions of dollars, to purchase the property, and if they acquired the title at such sale, they were to execute the contract of 1st Nov., 1865, by delivering to Stanton, Elliott & Willson the five and a half millions of dollars in bonds required thereby. (See agreement 3d and 9th July, 1866, record 406, pages, 40, 41, 42.) If they did not execute the contract of 1st November, 1865, they were to convey the property purchased to the committee.

The committee or trustees, Stanton, Elliott & Wilson, agreed on their part, in agreement 9th July, 1869, (record 406, page 42,) to pay to the trustees in several mortgages, the amount of the bid, which the Chicago, Rock Island & Pacific Co. should make at the foreclosure sale.

It further appears, by the evidence (see Elliott's deposition, Record, 406, page 44), that on the 1st of August, 1866, the Chicago, Rock Island & Pacific Railroad Co., by a pa-

per writing, undertook to act as agents for Elliott, Stanton & Wilson in paying to the assenting stock and bondholders the amounts which they were to receive under the contract of 1st Nov., 1865, by the Peter Myer's agreement, which agreement is set out in Record 344, page 39, and to close up the trust created by that agreement.

That in paying out to the assenting bondholders their share of the proceeds of the sale of 1st Nov. 1865, they retained three months interest on the bonds they paid out, making $83.837.83 (see deposition of Elliott, Record 406, pages 98, 99, and deposition of Wilson, Record 406, page 74), and that the bondholders released all claim to said three per cent. (See the agreements in stipulation, Record 406, page 38.)

It further appears by this agreement of agency of 1st August, 1866 (306, Record, page 44), that the C. R. I. & P. Railroad Co. agreed to pay the plaintiffs in the foreclosure suit all they were entitled to, to pay all the costs and expenses of the sale of the Mississippi & Missouri Railroad property, to indemnify the committee against all liability, claims, demand, or suit arising out of matters contained in the Peter Myer's agreement.

It also appears in evidence, that the Chicago, Rock Island & Pacific Railroad Co. were appointed the agents of the trustees of the bondholders to pay to such as did not assent to the terms of sale of 1st Nov., 1865, the amount they were entitled to receive under the foreclosure decree and sale.

It further appears (see Wilson's deposition, Record 406, page 86, and following) that the C. R. I. & P. Railroad Co. has in its possession all the balance of the five and a half million purchase; after paying the assenting bondholders, had on hand, after what was paid over to the receiver, at least $169,000 of the purchase money of the road for which it has never accounted, besides the $83,000 of retained and released interest, and that they have a large amount of earnings of the road prior to the sale, for which they have rendered no account. (See Elliott's deposition, Record 406, page 89.)

The Court below, on the hearing, decreed (Record 406,

page 131, 132, &c.) that McCollum was not entitled to the payment of any portion of the fund in Court, and his bill was dismissed, but the receiver was to pay his costs. That Frederick Foster, J. Bardwell, and H. S. McComb were entitled severally to share in the fund now in Court, as general creditors, to the same degree as the original plaintiffs, Howard and others, and to have their costs paid out of the fund in Court, that before they were allowed any thing the amount they would have been entitled to under the foreclosure decree, 20 per cent was to be deducted, and computing on this basis, the Court allowed Foster, $9,898; Bardwell, $6,718; McComb, $993. The Court also changed and uprooted the original decree in Howard's case, which subrogated the stockholders and their trustees or agents to the guaranteed bonds, which might be paid out of the 16 per cent., by ordering the receiver to collect the debts of the principal debtors in the guaranteed bonds, and bring the money into Court for further distribution among the creditors of the Mississippi & Missouri Railroad Co., and if anything remained thereafter, to pay the stockholders of the Mississippi & Missouri Railroad Co., and if any surplus after that, to report it to the Court.

From this decree all parties appealed. The plaintiffs, McCollum and others, in the consolidated bill, and the Chicago, Rock Island & Pacific Railroad Company, on the one side, and the plaintiffs and defendants in the original suit, on the other. The cross-appeal of the latter is No. 440, and has added only the record of their appeal. By agreement of counsel (record 406, pages 141 and 142,) the cross-appeal is to be heard on the same record as the appeal.

ERRORS ASSIGNED BY THE PLAINTIFFS,

Howard and others, inlcuding Elliott, Stanton and Wilson.

1st. The Court erred in allowing McCollum any cost.

2d. The Court erred in allowing anything to Foster, Bardwell, or McComb.

Errors assigned by Elliott, Stanton & Wilson.

The Court erred in reversing and altering the original

decree, which ordered the guarranteed bonds, coupons and judgments to be transferred to Miss. & Mo. stockholders, or their authorized agents.

ARGUMENT ON THE FACTS.

1. The allegation of the consolidated bill, that the fund now in the hands of the receiver is a part of the proceedings of the foreclosure, is totally disproved by the evidence, which is all in writing and cannot be controverted. The fund in Court is the stockholders' share, less ten thousand dollars of the proceeds of the sale of the Miss. & Mo. Railroad by the agreement of 1st November, 1865, by which the price of that sale was divided among the assenting stock and bondholders, according to a scale agreed upon. There never was any agreement by any parties, for any purpose, to bid five and a half millions for the road at the foreclosure sale. The Chicago, Rock Island & Pacific Railroad Company, by a written agreement, stipulated to purchase the property at the foreclosure sale, and to bid as high as *five* millions if need be to get it, and they stipulated that the committee or trustees who had undertaken to conduct the foreclosure and procure a good title to enable them to execute the contract of sale of 1st November, 1865, were not to bid at the foreclosure. It farther appears from the record evidence, that the sale of the property was in separate parcels, under each mortgage, and that all the bonds of the plaintiffs were included in the first land grant mortgage, except two of McCollums, and one of Bardwell and McComb's, making $2,750, which were included in the last mortgage. Under the foreclosure sale, the price bid for the first land grant mortgage property was $800,000, which was 20 cents on the dollar of the debt, and the property being exhausted there was nothing bid on the last mortgage.

Even if five and a half millions had been bid or agreed to be, the plaintiffs totally fail to allege or prove what share of the money now in Court was bid or agreed to be bid, or is rightfully to be paid on their share of the property, and in the absence of such showing they can establish no prior lien on the fund in Court, as part of the proceeds of their mortgage sale.

Their lien on the property itself was diverted by the foreclosure sale.

2d Hilliard on Mortgages, 125.

And it was the duty of the plaintiffs to look to their trustees in their mortgage for the proceeds. The bill not only does not make their trustees parties, but it does not charge them with neglect or fraud. The Court below held that McCollum and others had made no case which entitled them to any lien as preferred creditors, and no specific prior lien on the fund in Court.

2. The Court dismissed the bill of McCollum and made the defendants pay his costs, and allowed Foster, Bardwell & McCollum to come in now as general creditors, and divide the fund *pro rata* with Howard and others, thus opening the decree which was affirmed by this court, and that also at the cost of the fund in Court.

We shall endeavor to show that so much of this decree as allows any of these parties anything out of the fund, as creditors, in any degree, is entirely erroneous, and that the bill should have been dismissed as to all of the parties, at their costs.

If the Howard bill had been filed by some creditors for the benefit of all, as it was not, and if the Court had treated it as a bill for the benefit of all the creditors, and ordered a notice to be given, that all should prove their accounts before the master, which it did not, yet the present plaintiffs, McCollum, Foster and others, would now be allowed to open the final decree.

They came in too late, and they are purchasers during the litigation, for the purpose of opening the same, as is the case of McCollum & Foster or their claims are presented by the Chicago & Rock Island Railroad Co., which has agreed to pay them, and to whose agents they were given to collect, as is the case of Bardwell & McComb.

That a claim purchased during the litigation will not be allowed to be proved is fully established by the following decision (Wilder v. Keeler, 3 Paige, 164):

5. "This was a creditor's bill to settle and administer the real and personal estate of the deceased. The usual

decree was entered for an account, and for creditors to come in and prove up their demands. After the filing and confirmation of the report, Wright, one of the complainants, bought up a claim which had not been proved. He presented a petition asking to be permitted to prove his account so as to get a rateable share of the fund."

By the practice of the English Court of Chancery it appears to be a matter of course to permit a creditor to come in and prove his debt at any time before the fund is actually distributed and paid out, upon a sufficient excuse shown for not coming in before the master in due season, and upon payment of all costs which have been produced by the delay. In such case he must pay the expense of proving his debt before the master. And in the case of Gillaspie v. Alexander, 3 Russell, 130, the master of the rolls permitted a creditor to come and prove his debt, after a part of the distributees had received their shares. Although, upon appeal, his decree was reversed, so far as it went to change the whole debt upon these shares of the legatees, which remained in Court, Lord Eldon did not question the propriety of permitting the creditors to come in and prove his debt even at that late period.

To the applications now made there are some objections of a technical character, as well as those which go to the merits of the application. As a general rule a party should come in by a supplemental bill (not a petition). "Although the decree is in favor of all the creditors, who may elect to come in and prove their debts under the same, it does not follow that a stranger, or even a party to the suit, may afterwards buy up the claims of these creditors and come in of course under the decree independent of these technical difficulties. I think it would be inconsistent with public policy, unless there was a surplus, to permit the *parties to the suit* or *strangers*, after the master has made his report, to buy up claims against the estate" (how much worse, when he buys of one of the defendants who has neglected to prove his claims, and answered that all he asked was protection under the decree for paying the claimant) "which the owners of these claims had neglected to prove before the master, and which perhaps, they might

not be disposed to prosecute on their own account. The purchase of this claim was particularly objectionable, because it was purchasing a *chose in action*, as to which there must necessarily be litigation."

"I cannot, in the exercise of a sound discretion, establish a precedent, which will have a tendency to encourage speculations in disputed claims, when perhaps the holders of these claims would never think of prosecuting them on their own account or at their own risk, in respect to costs. The petition must be dismissed."

Wilder v. Keeler, 3 Paige, 164.

We might rest this cause upon this case alone. The claim of McCollum was purchased of the Chicago, Rock Island & Pacific Railroad Co., a party defendant who had appealed and the decree affirmed. The claim of Foster was purchased, after decree, at the instance of that company, for the purpose of litigating and delaying a distribution. The claims of Bardwell & McComb were filed in this suit, after final decree, by the agent of the Rock Island Co., which company had assumed by written agreement to pay them, and they were delivered by that agent to other attorneys, strangers to the parties and to the cause, to prosecute in this suit, and to present, on the bill, to the Court below, an appearance of honesty which they did not possess. The Court below not only allowed Foster, Bardwell and McComb to prove up their claims upon a mere petition to intervene without assigning any excuse for delay, but at the cost of the fund eighteen months after the decree was made.

4. The Howard bill was filed by judgment creditors, after execution and return, *nulla bona*, to reach property of the debtor by the aid of a court of equity. It is the ordinary case of a creditor having judgment and execution returned, *nulla bona*, seeking the aid of a court of equity in enforcing his execution.

This cause has, in the argument, been likened to the case of a creditor's bill to compel the discovery and payment of dead men's assets.

In cases of that nature, "A creditor may file a bill for payment of his own debt, and seek a discovery of assets

for this purpose only. If he does so, and the bill is sustained and an account decreed to be taken, the Court will make a final decree in favor of the creditor without sending him back for the payment of his debt; for this is one of the cases in which a court of equity being once in possession of a cause for discovery, will proceed to a final decree on the merits. Upon a bill thus brought by a single creditor for his own debt only, no general account of debts is usually directed to be taken, but the common course is to direct an account of the personal estate, and of that particular debt, which is ordered to be paid in due course of administration."

1 Story's Equity Jurisprudence, §546.

"The more usual course is for one or more creditors to file a bill, commonly called a creditor's bill, by and in behalf of him or themselves, and all others who shall under the decree."

1 Story's Equity J. 647.

"The usual decree in such case, is to direct the master to take the account and to cause public notice to be given to all the creditors to come before him and prove their debts."

1 Story's Equity J. 548.

This is not applicable where the executor admits assets, for then the payment to the creditors who bring the suit is made at once; and as soon as this decree to account is made the executor is entitled to an injunction to restrain creditors from sueing at law.

When a suit is instituted in equity against an executor for payment of money by his testator, the bill is filed sometimes by a single creditor for the payment of his own debt only, sometimes by several creditors for the like individual satisfaction, and at other times, and more commonly, by one, or more than one creditor, for the payment of all the debts of the testater. When the bill is filed for the payment of all the debts, the Court takes on itself the general administration of the assets, and by a decree of *quod computet*, directs the master to take the accounts between the debtor and all his creditors. When the bill is filed by one, or more than one creditor, for individual satisfaction only, the Court may confine the administration of the assets,

and accordingly the decree to account to the exclusive object of the suit," which is the return of Howard's bill and the decree therein. "But the Court has, it would seem, the power, in the instance of this bill also, to assume the general administration of the assets," which the Court in Howard's case did not do.

Ram on Assets, Debts and Incumbrances, pp. 293-4.

"The rule, that different persons claiming under different titles cannot join as plaintiffs in same suit, does not apply where the titles, though distinct, are not inconsistent.

"Thus all the creditors of a deceased debtor may be joined as co-plaintiffs to administer the assets of the debtor, although it is not necessary that they should be so joined, as one creditor may sue for his debt, against the personal estate without bringing the other creditors before the Court. The joining of several creditors, although it might save expense, might be productive of inconvenience. Courts of equity have adopted the practice, which, while it saves expense, obviates the inconvenience of joining too many, by allowing one or more creditors of an estate to file a bill in behalf of themselves and others who may come in and join them, in which case the decree is made applicable to all others who may come in and prove up, and if they decline to do so they are excluded from the benefits of the decree, and will be considered as bound by it. It is a matter of convenience rather than indulgence to permit such a suit, as it tends to prevent several suits, which might be inconvenient as well as burdensome to the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may, as at law, gain a preference by the judgment in his favor over other creditors in the same degree, who may not have used equal diligence."

1 Daniel's Ch. Prac. pages 228, 229.

The cases cited by all these elementary writers are, on the main points, the same.

Anon. 3, Atkins 572.—"Any one bond creditor may bring his bill against an executor for an account of assets, and it is no objection for want of parties to say that he has not joined others, for one may bring his bill alone as the Court

may decree an account, and direct the executor to pay in due course of administration."

Eldgell v. Haywood, 3 Atkins, 357.—"It is objected that this suit is by one creditor only, and ought to be by all; but the person who first sues has an advantage by his legal diligence in all cases, and of chattels in possession, the first suit has the first satisfaction." This was a case against an insolvent and will be referred to again.

"Lord Redesdale has remarked upon this class of cases, that "as a single creditor may sue for his demand, out of the personal assets, it is a matter rather of convenience than of indulgence, to permit a bill by a few in behalf of all the creditors. And it tends to prevent several suits by several creditors, which might be highly inconvenient, as well as burdensome to the fund to be administered. For if a bill be brought by a single creditor for his own debt, he may as at law, obtain a preference by judgment in his favor, over other creditors of the same degree, who may not have used equal diligence" There is great truth in this remark, but it does not disclose the whole ground of the doctrine. It is on the other hand the real danger of doing injustice to parties not before the Court, whose interest might be jeoparded, without being represented, and the utter impracticability of making all the interested parties actually and technically parties, from their being unknown or so numerous, that any obligation to join them all would amount to a positive denial of justice, which constitute the main grounds of the doctrine.

Story's Equity Plead. §100. Mitford Plead. 166.

"The difficulty of bringing before the Court all the persons in interest, has also induced the Court in some cases to depart from the general rule, where persons are in the same interest and allow a few to bring a suit in behalf of themselves and all others of like character. Thus allowing all the rest to come in, and if they decline, excluding them from the benefit of the decree if they do not. As a single creditor may sue for his demand out of the personal assets, it is a matter of rather convenience than indulgence to permit a suit by a few in behalf of all,—for if a bill be brought by a single creditor for his own debt, he may as at law,

gain a preference by the judgment in his favor, over other creditors af the same degree, who may not have used equal diligence.

Mitford's Pleadings. [166.]

"Where a single creditor files a bill for the payment of his debt only, the Court does not direct a general account of the testators debts, but only an account of the personal estate, and that particular debt which is ordered to be paid in due course of administration."

Att'y Gen'l vs. Cornthwaite, 2 Cox' Ad. C., 44.
Morice vs. The Bank of England, cases Tem. Talbot, 217.
Same case, more fully, 2 Brown's P. C. 465.
" " " " 3 Swanston, 575.

"This Court in the distribution of legal assets follows the rule of the law, that allows a preference to creditors, who have made use of legal diligence in getting in their debts. Here courts of equity and courts of law have concurrent jurisdiction. A legal creditor may bring a bill for discovery of assetts; the more ancient way was to bring a bill for discovery alone, but now for discovery and satisfaction too."

In the present case the assets are legal, not equitable.

"In Abbie vs. Winter, the bill was brought by the bottomry creditors against the Executor, and the contest was between creditors under two decrees. It was held that the Executor was to be charged but once, and the creditors who had obtained the first decree were to be paid first, and the executors were not to be liable to the demand of creditors further than the assets would extend. This confirms us in the notion that a decree binds assets from the time of pronouncing it. Decrees and judgments, therefore, in the administration of legal assets, must stand on an equal footing, that which is prior in time, be it a judgment or decree, must be first satisfied out of the assetts."

Morice vs. Bank of England, as above.

As the distinction between legal and equitable assets is constantly referred to, let us obtain definite ideas of each.

"That portion only of the estate of the deceased party are legal assets whitch by law are directly liable, in the

hands of the executors to the payment of debts and legacies. Generally speaking they are such as can be reached in the hands of an executor by a suit at law against him, or by a judgment on a *devastavit* against him personally, but it is perhaps more accurate to say, that legal assets are such as come into the hands and power of an executor, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration. In other words whatever an executor takes *qua* executor, or in respect to his office is to be counted legal assets."

1 Story Ju. §551.

"Equitable assets are all assets charged with the payment of debts or legacies in equity. They are called equitable, because they can be reached only by the act of a court of equity. They are called equitable for another reason—that the rules by which they are governed are different from those of the distributions of legal assets; they are of two kinds, those which are created by intent of the party, and those which result from the nature of the estate."

1 Story Equity J., §552. 1 Sheve 313 note

"Money produced from the sale of real estate, and all kinds of personal estate, goods, debts due the deceased, are legal assets.

Ram on Assets, 143-5.

"Legal assets, a court of equity will distribute according to the order obtained at law, in paying the debts of a deceased person. Equitable assets a court of equity will distribute equally among creditors.

"When a court of equity distributes or administers legal assets, it allows the creditors to enjoy the right of priority to which they are entitled by a court of law, and accordingly where such assets have consisted of personal estate, the court has followed the priority observed at law, and paid a debt by a decree in chancery before debts by bond."

Ram on Assets, 317.

"Where a party, by will or deed, charges his real estate with the payment of debts, it is equitable assets."

Story, sections above and following.

The case of Curran vs. State of Arkansas, applying these principles to the case of an insolvent corporation, held that the assets of such a corporation are legal assets, which can be levied on, and incidentally that a single creditor may bring a suit for himself alone, and he will be entitled to a decree for his own debt. In that case, Curran, a holder of a small portion of the unredeemed bills of the State Bank of Arkansas, obtained a judgment at law and execution, and filed his bill in equity against the State, charging it with having by unlawful legislation obtained all the assets of the corporation, and praying the assistance of the Court of Equity, to reach such assets of the Bank as ought to be appropriated to satisfy this judgment debt.

The Court, 15 Howard, page 307, says: "The plaintiff is a creditor of an insolvent banking corporation. The assets of such corporations are a fund for the payment of its debts. If they are held by the corporation itself, and are so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among the stockholders, or gone into the hands of others, than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the part in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of these debts."

"This has often been decided, and rests upon plain principles. In 2 Story's Eq. Ju. §1252, it is said "perhaps to this same head of implied trusts, upon presumed intention, (although it might equally well be deemed to fall under the head of implied trusts, by operations of law,) we may refer that class of cases, where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or *right of priority* of payment in preference to any of the stockholders. Then, for example, the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of the capital stock, until all the debts are paid, and if the capital stock is divided leaving any debts unpaid, every stock-

holder receiving his share of the capital stock would in equity be held liable, *pro rata*, to contribute to the discharge of such debts of the corporation."

Curran vs Arkansas, 5 Howard, 308.

Many cases are cited to sustain this principle, but it does not mean that this fund, a trust implied by law for the creditors, is to be always divided equally among them. It means that this trust fund is to be applied for those creditors who claim it by due process of law; and that equity pays and prefers them who use diligence in that respect; for not only this case, but all the others cited, except one, where the trust was conferred by the Legislature on trustees for all the creditors, after a forfeiture of the charter, were by a creditor or creditors who sued solely for him or themselves, and the decree was for him or them only, and not for those who were not before the Court. The creditors in each case were only a part or one of the creditors of the corporation. Another and conclusive argument, that this is so, results from this principle. Suppose the insolvent corporation in good faith applies all its assets to pay only a part of its creditors, and none to the rest; does any person suppose that the creditor not paid, can recover his share of the money paid, from the creditor who has received his money, and compel him to divide, after he has got it, by process of law, like he could make a stockholder pay back, because the creditor has a prior lien.

This language of the court and commentators means that it is trust fund for them who use legal process to obtain it, and not for all indiscriminately, and upon this point we have what we regard as quite satisfactory authority.

Egberts vs. Woods, 3 Paige 517.

"It is urged in behalf of the complainants that upon the dissolution of a firm, by death of one member, the survivors become trustees for all the creditors of *an insolvent* firm, and have no right to pay one creditor to the exclusion of another, but that all must be paid rateably. If this be so, then this bill should have been filed by the plaintiffs for themselves and all others. Where it appears on the face of the bill, that the fund will be deficient and there are

other creditors, who are rateably entitled, they should be made parties, or the suit should be brought by plaintiffs for themselves and all others.

Where an express trust is created for the benefit of creditors, without any order to the trustees to prefer, it both at *law* and *equity* a trust for each creditor rateable. And even in cases of implied trust, unless one creditor has acquired a lien by superior diligence, or has a legal preference, this Court will act on the maxim, equality is equity. But this has not always been adopted at the common law. On the contrary, it pays priviledged creditors, and even among creditors of the same class, the personal representative might pay one creditor in preference to another.

So by the law merchant, although the effects of a partnership in insolvency were in equity considered a trust fund for the payment of the partnership debts, and any one of the parties might apply to this Court for the purpose of having the partnership funds rateably appropriated, yet either of the parties, before dissolution, or all after, might unquestionably exercise the right of appropriating these funds to the payment of one creditor in preference to others."

Egberts vs. Wood, 3 Paige, 520, 521.

And no different principle can be made to apply to the limited partnership created by law, and called a corporation.

And here we may comment on the two cases which are relied upon on the other side to sustain them.

The case of Williams vs. Gibbs, 17 Howard, 255: In that case Williams was one of the original partners in the transaction and had an interest in the common fund from its creation. He was one of the original partners and contributors of the money or property, which created the common fund. The Court held, 17 Howard, 255: It is well settled in respect to proceedings in chancery for the distribution of the common fund among the several parties interested, that an *absent* party *who has no notice* of the proceedings and is not guilty of wilful fraud, or unreasonable neglect will not be concluded by the decree of distribution from asserting his right by bill or petition against the trus-

tee, executor, or administrator, or in case they have distributed the fund in pursuance of an order of the Court against the distributees." citing David vs. Frowd, and among others Gillespie vs. Alexander. In every one of these cases, the person claiming, had an original inherent interest in the fund, equal to any of the parties who were before the Court. One of the cases so fatally injurious to the claims now presented, that we cite it on our own side. It is the case of Sawyer vs. Bechmore, 1 Keen, 391, head note: "Though the distribution of an intestate's estate under a decree of the court, among persons found to be next of kin, does not conclude the rights of the persons, who may have an *equal* or paramount title, yet the Court will not assist others next of kin who with full notice of the proceedings in the suit, wherein the fund was distributed, have neglected to prosecute their claims."—Text page 401: "The rule applicable to cases of this nature, as stated by Lord Eldon in Gillespie vs. Alexander, is that a creditor who does not come in till after the executor has paid away the residue, is not without remedy, though he is barred from the benefit of the decree. If he so minds he may sue the legatees and bring back the fund." David vs. Frowd, the next of kin sued those who claimed to be next of kin and compelled them to refund. But all cases must be affected by their peculiar circumstances. The claim of the creditor in Gillespie vs. Alexander was under investigation in the master's office, before and at the time the order of distribution was made. David vs. Frowd was concluded with extraordinary rapidity. Grey vs. Sonenville, the party was a foreigner; though he knew of the death of the intertate debtor, he did not see the advertisements in the London Gazette."

1 Keen, 401—13.

Gillespie vs. Alexander, 3 Russel, 130, is the other case relied on by the other side. In that case, the bill was filed for *all* the creditors; the court directed the master to report the usual account of his assets and of his debts and legacies. The court decreed the payment of the debts as reported. Law, before all the fund was distributed, asked that he might prove his debt, which was allowed on the pay-

ment of costs. The Lord Chancellor, "although the language of the decree, where an account of debts is directed is that those who do not come in, shall be excluded from the benefit of the decree, yet the course is to permit a creditor, on paying the cost, to prove his debt as long as there happens to be a residuary fund in Court, or the hands of the executor, and to pay him out of that residue."

This Court will perceive there is a wide and plainly marked distinction between the case at bar and those of Gillespie v. Alexander, and Williams v. Gibbes. In these cases the claimants were original owners of the fund, or the decree was for all creditors to come in. In this case both the bill and decree were for creditors before the Court, and them only, and the holder of these claims, through whom they are now presented, the Chicago, Rock Island & Pacific Railroad Co., at that time had all the bonds and coupons represented by McCollum, in their possession, induced Foster to purchase for their benefit, filed the claims of Bardwell & McCollum, which, with the others, they had agreed to pay in full. They not only had notice of the suit of Howard, but were parties to it. They not only presented no claim to the fund, but averred, by their answer, their readiness to pay it over; admitted that they had undertaken, as agents, to pay it out, and after this they induced Foster to buy; fraudulently transferred to McCollum bonds which they had taken up when agents, and as agents, and caused the claims of Bardwell and McComb to be filed after they had agreed to pay them. Judging the case by the circumstances which surround it, there never was less cause for a court to aid a party than is presented by the evidence in this cause. The Chicago, Rock Island & Pacific Railroad Co. is endeavoring to perpetrate a fraud on the Court by assigning claims which it had when the suit was brought, and which it purchased, as an agent, for the benefit of its principal, and has induced parties to purchase claims and present claims to the Court below to delay and diminish the distribution of the money decreed to the original plaintiffs.

Conceding that it was in the power of the Court below, on the filing or hearing of Howard's bill, to make it a bill

for all the creditors; it did not exercise that power, but permitted the plaintiffs to prove up their demands, and gave them a specific decree for the funds in Court. If the Court below had not this power, the judgment should have been reversed and sent back for the want of proper parties; for "if the plaintiff improperly omitted to sue for himself and others, his bill is liable to objection for the want of parties, and in other cases would deprive the plaintiff of the relief he sought."

1 Daniels C. P., 364.

5. We maintain that this bill of Howard's is not like that of a creditor of a dead man's estate going into a court of equity to reach legal assets which he cannot reach at law, or to marshall equitable assets; but that it is the claim of judgment creditors going into a court of equity to reach property on which an execution cannot be levied, and the authorities, in such case admit of no exception, that the creditor under such circumstances, who first seeks the aid of a court of equity, gains a preference by his diligence.

"A judgment creditor, who has taken out execution and files his bill for the aid of a court of equity, gains by his execution and legal diligence a legal preference to the assistance of this Court, or a lien upon the equitable interest of a debtor, which cannot be affected or impaired by any such subsequent assessment, either for the benefit of creditors generally, as under the insolvent act, or for the benefit of a particular creditor."

McDermott v. Strong, 4 Johns., C R. 687.

"It is a well settled principle that a court of chancery should assist a judgment creditor to discover and reach the property of his debtor, who has no property that can be reached by execution at law, and where a creditor has, through the instrumentality of a court of equity, sought and discovered property of his debtor, which he had before been unable to discover and seize at law, that he becomes entitled to a preference over other creditors to have his judgment first satisfied even under the insolvent laws."

Gardner v. Lorrill, 21 Maine, 257.

"This conveyance, being made without consideration, in favor of Conn's creditors, Dugan is considered, in equity, as

a trustee for creditors. The next question is can all the creditors of Conn come in under the decree of the circuit court, prove their claims and be entitled to an equal distribution of the fund.

"We think they cannot. The rule in equity appears to be well settled—'that the creditor who first files his bill in equity to subject such estate to the payment of his judgment obtains a priority and preference over others, although his judgment may be junior, because neither the judgment nor execution is any lien on the estate, and the only way in which the creditors can create a lien on it is by filing a bill in equity. Such a bill, the instant it is filed, becomes a specific lien, and the creditor who first files his bill obtains a priority and preference over the other creditors as a reward for his diligence."

U. S. Bank v. Burk. 4 Blackford, 145.

"A creditor whose execution is returned unsatisfied may file a bill to reach the equitable estate of the defendants, either in his own name, and for his own benefit, or he may join other creditors in the same situation, or he may file a bill in behalf of himself and all others like him, who may choose to come in under the decree and contribute to the expenses of the suit. Every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts."

Edmunston & Riddle vs. Lyde, 1 Paige, 637.

"This Court has frequently decided that the creditors who first files his bill here to reach the defendant's property, obtains a preference, and the defendant has no right to object that there are other creditors whose debts he has refused to pay. Equality among creditors is equity, whether there debts are in judgment or otherwise, and every debtor has the right to act on that principle, without impairing any of his rights. If he is an honest man and wishes to put all his creditors on an equality, he may assign his property to them equally, or convey it to a responsible trustee to divide it equally before any judgment. But the filing of a bill here is a lien on the property, and gives to the vigi-

lant creditor priority of payment, and the creditor who next files his bill will have the second lien."

Corning vs. White, 2 Paige, 566.

To the same effect see:

Eager vs. Price, 2 Paige 333.
Burrel vs. Leslie, 6 Paige, 445

And still more strongly is the case put in Edmunston vs. Lyde, 1 Paige, 637–39.

"The first question is as to the rights of other judgment creditors, and whether they are necessary parties. I have once had occasion to examine this question elsewhere, and the conclusion to which I arrived was that the creditor whose execution at law was returned unsatisfied might file a bill to reach the equitable estate of the defendants ,either in his own name and for his own benefit, or he might join with others, standing in the same situation, for their joint benefit, or he might file a bill, in the usual way, in behalf of himself, and all others standing in the same situation, who might choose to come in under the decree and contribute to the expense of the suit. I can see no reasonable objections to either mode of proceeding. The latter at first blush may seem more equitable, but the two first are much more likely to insure a vigilant prosecution of the suit. And on further examination it may seem unjust that a creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails of these, who had slept on their rights or who have intentionally kept back, that they might profit by his exertions when there could be no longer any risk in becoming parties to the suit," or who have failed to file their claims, when they were parties, or who have bought them after the termination and come in to delay the distribution of the money.

Edmunston vs. Lyde, Paige, 638–9.

In Ogelvie vs. Knox Insurance Company, 2 Black. 539, this Court intimated the correctness of the above principles, and in Bronson vs. Railroad Company, 2 Black. 524, this Court held that general creditors, having no specific lien, had no right to intervene in a contest between debtor and

creditor, and censure the practice of coming in after a cause has been heard and its merits passed upon.

"Where a fraudulent conveyance has been made the creditors, or any one of them, may file a bill in equity to have the same set aside, and in such case it seems to be the better opinions, that the creditor who first files his bill obtains a priority, and is entitled to be first paid from the proceeds of the sale."

George vs. Williamson, 26 Missouri, 190.

In case of Miers v. Zanesville Man. Co., 11 Ohio, 273, and 13 Ohio, 197, is precisely like the one at bar. It was a case of creditors against an insolvent corporation. In the 11 Ohio, 276, the case was kept over that the Court might ascertain and determine which party of creditors had priority by reason of legal diligence, and when the cause was heard the Court said, "This bill is brought by a judgment creditor to pursue and obtain the arrears of certain shares of stock subscribed and unpaid. The answer of the company is now filed, admitting the existence of these assets, and claiming that an account be taken of the creditors of the Company, and the amount realized distributed equally among all. This claim of the company for equal distribution is inadmissible; for the vigilant creditor, pursuing his claim acquires a preferable equity, which attaches and becomes a specific lien by filing his bill."

Miers v. Zanesville M. Co., 13 Ohio, 198.

6. Events, since this appeal, to which we may allude, as they occurred in open Court, justify us in calling your attention particularly to the claims of McCollum. They consist of $75,000 of bonds of the fourth mortgage, scaled at 70 per cent., which the Rock Island Company, while acting as agents of the trustees of the assenting bond-holders, extinguished (we will not abuse the word purchased) by paying to Durant, the holder, the scale price, after 1st August, 1865, and $28,000 of coupons cut fraudulently from bonds which the Chicago & R. I. Co. bought at 62½, and immediately assented to the sale by signing the Myers agreement, on Jan. 1866, (see 406 Record, 30 to 36), and the Chicago, Rock Island & Pacific Railroad Company, successor to Rock Island Company, after they were made de-

fendants to the original suit answered, that they had agreed to give the stockholders their 16 per cent, and disclaimed any interest in the fund; had no defence to make, and asked the Court to make a decree protecting them in paying it out, (344 Record, 22), though Tracy, their President, fraudulently assigned the whole to McCollum, his brother-in-law, for fifty per cent, after the final decree in this cause, that McCollum might intervene, and delay the distribution of this fund and the end of this litigation. There are several distinct and independent grounds, on which this decree is justified.

Of these, perhaps the most conclusive, and one on which we ask the Court to pass is, that McCollum is exactly in the place of the Rock Island Company, having bought of them, bonds and coupons, due—dishonored and foreclosed —in fact, barred and extinguished by the foreclosure decree, so far as the trust property is concerned. The Rock Island Company was a party defendant to the Howard suit, and held these bonds and coupons then. It not only set up no claim, but said affirmatively it had none. It is concluded by that decree, not only for what it did answer but for what it ought to have defended.

City of Aurora v. West, 7 Wallace, 82.

The Chicago & Rock Island Co. also, by its express agreement, in the purchase of this property, of 1st Nov., 1865, specifically agreed to pay to the assenting stockholders to the sale, not to the corporation, 16 per cent. of the face of their stock, and both it and its assigns are estopped by that agreement from setting up a claim to this fund arising out of *any* demand against the Mississippi & Missouri Co.

Again: The Chicago & Rock Island Company, holders of the 800 coupons and bonds, which they fraudulently detached from 800 bonds, signed the Peter Myers agreement, by which they expressly stipulated to receive 70 per cent. of these bonds, and to allow 16 per cent. to be paid to the stockholders, not the Company.

Lastly: The Chicago, Rock Island & pacific Co., while acting as agents of the committee or trustees of stock and bondholders, took the very money placed in their hands to

pay the McCollum bonds their scale price, and paid the scale, and instead of surrendering the bonds so paid for, with their principal's money, to their principal, fraudulently sold them to McCollum, to enable him to come into Court with said fraud, concealed and impure, and delay the execution of the affirmed decree.

An agent or trustee can make no speculation or profit out of his principal's business. If he buys a security at a discount, or becomes the beneficial owner of the property, purchased with his principal's money and while in his employ, it is for the benefit of his principal.

If he buys in an incumbrance it is for the benefit of the estate. He cannot retain the property purchased discharged of the trust.

Paley, Agency, 9. Hill on Trustees, 114, 534. Green vs. Winter, 1 J. C. 27. 4 Do. 671. Hawley vs. Manciur, John C., 174. Sweet vs. Jacobs, 6 Paige 35. Matter of Oakly, 2 Ed. Ch. 478 Boyd vs. Hawkins, 2 Dev. Eq., 185.

The Rock Island Company, as agents of the trustees, Stanton, Elliott & Wilson, having purchased of Durant the McCollum bonds, with the money intrusted to them as agents to pay the 70 per cent., purchased them for the benefit of the trust, and extinguished them just as completely as if they had required the Myers agreement for them.

And the Chicago, Rock Island & Pacific Co. now has the impudence to apply to the Court below to allow them to come in and prove up another batch of claims, equally fraudulent and unfounded, which they had, when they answered that they had no defence to make to the original, and hope thus to delay the execution of this decree another three years. We are not imposing on the time or patience of the Court, to ask them to place McCollum and the Chicago, Rock Island & Pacific Co. in such a position, by their judgment, that they can delay and hinder us no more.

Having established, as we believe, that the decree which dismissed McCollum's bill was correct, we not only ask its affirmance but we ask against the Chicago, R. I. & P. R. R. Co. and McCollum, that as they have appealed from the distribution of any part of the fund, and the claim pre-

sented by them is a fraudulent one ; that they be assessed in the highest damages which this Court can give. Their whole claim, fraudulent as it could be, was only a hundred thousand dollars and interest, and the fund on hand was over seven hundred thousand dollars. They could have had no motive in appealing from the distribution of the balance but that which induced McCollum to begin, to delay the plaintiffs in their remedy. We not only asked that they be made to pay exemplary damages, but that the decree here shall be in such form that they will not repeat what they have already by fraud and imposition in the Court below accomplished—make a further delay in the distribution of the money.

7. We ask that all parts of the decree adverse to Howard and others, and Elliott and others, the trustees, be reversed.

We have fully shown why there should have been no decree in favor of either Foster, or Bardwell, or McComb. There is another part of the decree still more unjust.

The Court in the Howard case, decreed that the guarranteed bonds when paid by the 16 per cent. of stockholders' fund, should be delivered to the trustees or agents of the stockholders, Stanton, Elliott and Wilson, on the ground that a guarantor, when he pays the principal debt, has all the rights of the holder against the maker. (Record in 344, page 113.)

But the Court has on this bill of McCollum and others, without petition, notice, cross-bill, or other application by any party whatever, altered the original decree atfer affirmance by this Court. The Court below now decrees that the receiver shall collect there guarranteed bonds, return the collections to the Court, and hold the money subject to further distribution to the creditors of the Miss. & Mo. R. R. Co.

The plaintiffs in the original suit did not ask for this modification, neither did McCollum and associates. It, the decree as altered, not only requires of the stockholders to give up the 16 per cent. they were entitled to under the sale, but it requires that if this 16 per cent. is ever collected for them, they shall not have it, but the Court will hold it for

creditors, of which it has no proof that there are any, but it makes no order or decree to find out if there are any.

From the principles laid down by this Court in relation to altering decrees after the period allowed for amending them, this alteration could not have been made if there had been regular pleadings asking it. A bill for that purpose would have been dismissed, (see Elliott vs. Pell, 1 Paige, 269,) and Elliott, Wilson & Stanton ask that this part of the decree may be reversed, and the guarranteed bonds delivered to them, the agents or trustees of the stockholders, as provided in the original decree, to which the plaintiffs in that suit neither then nor now make any objection.

JAMES GRANT, *for Howard and others,*
Elliott, Stanton & Wilson.

REPLY TO THE ARGUMENT

Of Mr. S. W. Fuller, for Appellants, McCollum and others.

The opening statements of the case on the first page, that there was an agreement between the bond creditors and shareholders, by which the latter were to have 16 per cent. of the par value of their stock "*out of the proceeds of the foreclosure sale*," has no foundation whatever in fact; it is a mere invention of the counsel. This agreement was a private contract prepared 20th October, 1865, carried out by contract of Peter Myers of 1st Nov. 1865, and the bonds not money, agreed to be paid were five and a half millions by the Chicago & Rock Island Co., when the forclosure was effected, so as to give a clear title. This slight mistake of Mr. Fuller pervades his whole argument. We annihilate it, by asking how much money did the property named in the McCollum and Foster bonds bring at the foreclosure

sale? This was the 4th mortgage on a part of the road. It was sold separately. It brought $800,000—twenty cents on the dollar. How much did the property under the last mortgage sell for? Not one dollar. Has the learned counsel pointed out what part of the money arising from the separate sales under the different mortgages bought, the 4th mortgage bonds were entitled to? The proof shows that the money arising from the sale under the 4th mortgage was paid to the trustees under it, and that the share due to McCollum and Foster and other bonds is on hand awaiting their demand, in fact in the hands of the holder of McCollum's bonds.

2. Another small mistake of fact occurs on page 12 of Mr. Fuller's brief, "*that the bonds and coupons of McCollum's, neither by him nor any holder ever assented to the sale.*" Why, it is conceded that the Chicago & Rock Island Company, holder of the 800 bonds, assented to the terms of sale on 21st Jan., 1866; and that as agents of the committee, they bought, through Dows, a director, the other bonds at the scale price, (see 406 record, 34, 35, 36,) and the Rock Island Company, not only as principals, had already assented to the sale, but purchased the bonds of Durant at the scale price, as agents of the committee to negotiate the sale with them.

3. Another error of Fuller, page 51: "There is no proof in this record that the trustees ever gave the notice or made the advertisement required by the decree."

Then it is because they did not copy the proof in their record. With us the maxim, *Omnia rite*, is sufficient.

But there is much more damaging proof to Mr. Fuller's clients.

By the deposition of B. Wilson, (406 record, 56, 57, 58 and 59): "The foreclosure was to cut off the right of non-assenting bondholders."

"Can you tell how the non assenting bond-holders were provided for, by this foreclosure suit?" Ans.—"They received there *pro rata* share of the proceeds of the foreclosure—about 20 per cent."

"The Chicago, Rock Island & Pacific Company, so I understand, provided the money bid at that sale."

"They were the agents of the trustees under the mortgages, for the purpose of paying the non-assenting bondholders." "They agreed to furnish the money due on the foreclosure sale." They were to pay to the trustees the $2,100,000 in cash.

From E. Cook's deposition, 344 record 56: "No money was paid on the day of sale. An arrangement was made to pay the amount of the several bids to the trustees of the mortgages in New York, and it was so done."

The Chicago, R. I. & P. Co. were agents of the bondholdholders' trustees, were to furnish the money bid at the sale; did do so; were to pay the nonassenting bondholders their *pro rata* share of the foreclosure sale. They held these McCollum and other bonds; assented directly to the sale for all the cut-off coupons; owned the Durant bonds and had the money to pay them, and were agents of the trustees; did pay them, get them into their possession, extinguish them, and then made a cat's paw of McCollum and Foster.

4. There is nothing in the cases cited by the counsel, which weighs against our position.

In the case of Day v. Washburn, 24 Howard, 352, the trust for all the creditors was created by an assignment sought to be declared fraudulent, and the contesting creditor came in before decree, and none were judgment creditors, and the objection was not taken in time. The fund could alone be reached by a proceeding in equity. If the assignee had paid it away to any creditor, he would have been liable to others.

Wabash vs. Biers, 2 Black., 448, the bill was filed for all the creditors who should come in. Wiswall vs. Sampson, 14 Howard, 52, only decided that a receiver cannot be sued except by leave of the Court. Pennock vs. Coe, 23 Howard, 117, holds selling at law a portion of the property held as common security by different liens, is not valid during equity proceedings.

5. The counsel seems to forget that no bond or stockholder is entitled to any part of the private sale of this road, unless he assents to the terms of sale. By the contract any overplus after the scale price, is to be divided among the assents. He forgets that the Rock Island Co.,

his vendor, not only has the scale money of these bonds and coupons,—but bought them to enable them to assent ; were agents of the committee of assents, and have saved and have on hand abundant means to pay the whole of the bonds now represented, without disturbing the rights of the plaintiffs, Howard and others, and the assenting stockholders, represented by Elliott, Stanton & Wilson.

JAMES GRANT,
for Plaintiffs, Howard and others.

IN THE

SUPREME COURT

OF THE UNITED STATES,

December Term, 1870.

JOHN V. MCCOLLUM, FREDERICK A. FOSTER, J. BARDWELL AND H. S. MCCOMB,	*Appellants,*	*No. 181.*
vs.		
MARK HOWARD ET AL,	*Appellees.*	

ARGUMENT FOR APPELLANTS,

BY SAM'L W. FULLER.

Peach & Barnard, Steam Printers, 126 Clark Street.

IN THE

SUPREME COURT

OF THE UNITED STATES.

December Term, 1870.

JOHN V. MCCOLLUM, FREDERICK A. FOSTER, J. BARDWELL AND H. S. MCCOMB,	*Appellants,*	*No. 181.*
vs.		
MARK HOWARD ET AL,	*Appellees.*	

ARGUMENT FOR APPELLANTS.

This case has already been twice before the Court, as appears by 7th Wallace, 392: the *Railroad Co* v. *Howard*, and 9th Wallace, 175: *In the matters of Howard.*

In the first case, it appeared that the property and franchises of an insolvent railroad company had been sold under the decree of a court of equity, pursuant to an agreement between a part of the bond creditors and the shareholders, by which the latter were to have sixteen per cent. on the par value of their stock paid to them out of the proceeds of the foreclosure sale, and the question was, whether the shareholders, or Howard and others, who

brought that suit, as judgment and general creditors of the Railroad Company, had the better right to that part of the proceeds of the sale: And the Court decided, that the creditors were to be paid their claims against the corporation, before any part of its property should be returned to the stockholders, and affirmed a decree to that effect, made by the Circuit Court for the District of Iowa.

See the opinion, 7 Wallace, 411–416.

After the original decree had been entered in the Circuit Court, and while the appeal was pending in this Court, Frederick A. Foster, one of the appellants, filed his petition in the Circuit Court of the United States for the District of Iowa, showing that he was a holder and an owner of some of the bonds issued by the Mississippi and Missouri Railroad Company, which were secured by the mortgages that had been foreclosed; denying that he had ever agreed to take less than the full amount due upon his bonds, and claiming that he had a prior and better right to have his bonds paid out of the fund in the hands of the receiver, who had been appointed by the Court to take and hold the funds, which were the subject of controversy, than either the judgment or general creditors or the stockholders, who had been contending about the distribution of those funds.

Foster's petition was entitled in the suit of *Howard et als*, and rested without any action being taken upon it—until May, 1869, when the mandate of this Court, showing that the decree of the Circuit Court had been affirmed, was filed in the Circuit Court, and the counsel for Howard and others moved the Circuit Court to execute the decree, in their favor, as it had been affirmed by the Supreme Court, which motion was resisted by Foster, and also by McCol-

lum, Bardwell and McComb, the other appellants in this cause, who presented petitions substantially like those of Foster, and asked to have their bonds paid out of the funds in Court, in preference to the claims of Howard and the other creditors by judgment or simple contract.

It was then insisted by Howard and his associates, that their claims having been allowed, and ordered to be paid, by the Circuit Court, and that order or decree having been affirmed by the Supreme Court, they had acquired a preference as against the boudholders and all other creditors, whose claims were not presented until after theirs.

The Circuit Court, upon consideration of the petitions and motions of the respective parties then before it, ordered Foster, McCollum, Bardwell and McComb to file a consolidated bill against all the other parties to the record, setting out their claims to the fund in Court, and requiring the defendants to answer such bill, in due course of practice and proceeding in that Court.

This was done, and the bill and answers thus filed, are the beginning of the suit now before the Court, and which, at the last term, was docketed as No. 406.

When the Circuit Court allowed the applications of McCollum, Foster, Bardwell and McComb for leave to file their petitions in the original suit of Howard et al, against the Railroad Company, but upon the terms appearing on pp. 267–8 of No. 344, they prayed and were allowed an appeal to this Court, which they prosecuted by filing a transcript of the record, and docketing the case as No. 344 of the December term, 1869.

At that term the appeal was dismissed on motion of the appellees, because it was not taken from a final decree, but to save expense, the parties in the present suit stipulated,

that the record in case No. 344, should be taken as a part of the record in this cause. (See stipulation, page 142, folio 434). And thus the two transcripts are now before the Court, as the record in this case: No. 344 showing the proceedings prior to the intervention of Foster, McCollum, Bardwell and McComb, and No. 406 showing the proceedings had in the cause since they became parties, and the decree from which they appealed, and now before the Court for consideration.

For brevity and convenience, these records will be referred to as Nos. 344, and 406.

The appellants appear to be the owners and holders of bonds issued by the Mississippi and Missouri Railroad Company, and secured by mortgages upon its property and franchises; it does not appear that they ever agreed to accept anything less than the amount due upon the face of their bonds in payment of them, or that they were parties to any agreement to "scale," as it was called, the amount due from the Railroad Company on its different classes of bonds, and it further appears that the mortgages given to secure the bonds, have been foreclosed, the mortgaged property sold under the decree of foreclosure, and that after paying the parties who agreed to "scale" their bonds, the sums which they agreed to take in full payment of them, there remains in Court between five and six hundred thousand dollars, with several years interest thereon, which this Court has decided should be paid to the creditors of the Railroad Company in preference to the stockholders, so that the questions in the case, are first, whether or not the appellants are creditors entitled to payment of their bonds out of the fund in Court; and secondly, if they are such creditors, whether they shall be paid in full, as

lien-holding creditors, or, only *pro rata*, with the general creditors of the Railroad Company.

Assuming that the case shows, conclusively, that the appellants are owners and holders of bonds secured by the mortgages which were foreclosed, and that the funds now in Court were realized from a sale of the mortgaged property, it is insisted that the appellants have the same lien upon the fund in Court as they had upon the mortgaged property, and in the absence of any agreement on their part to the contrary, should be paid in full, (if the fund is sufficient for that purpose), as lien-holding creditors, in preference to subsequent judgment or simple contract creditors.

On this point the law seems to be well settled, and the very point is stated and decided by this Court, in the opinion given on the first hearing of the case, as reported in 7 Wallace, 414, where the Court say: "Mortgage bond-"holders had a lien upon the property of the corporation "embraced in their mortgages, and the Corporation hav-"ing neglected, and refused, to pay the bonds, they had "a right to institute proceedings to foreclose the mort-"gages, but the equity of redemption remained in the "corporation. Subject to their lien, the property of the "railroad was in the mortgagors, and whatever interest "remained after the lien of the mortgages was discharged, "belonged to the corporation, and as the property of the "corporation when the bonds were discharged, it became "a fund in trust for the benefit of their creditors. *Holders "of bonds secured by mortgage, as in this case, may exact "the whole amount of the bonds, principal and interest*, or "they may, if they see fit, accept a percentage as a com-"promise in full discharge of their respective claims, but "whenever their lien is legally discharged, the property

" embraced in the mortgage, or whatever remains of it, " belongs to the corporation."

The same point was expressly decided in the case of *Furness* v. *The Caterham Railway Company*, 27 Beavan, 358. The syllabus is as follows: "Railway debentures " were granted, by which the undertaking, and all tolls " and sums of money arising by virtue of the Act, and all " estate, right and interest of the company " were assigned " to the debenture creditors. Other creditors subsequent- " ly obtained judgment against the company, and after- " wards, by authority of an Act of Parliament, the rail- " way was sold, and the purchase money paid into Court: " —*Held*, that the debentures, being prior in date, had " priority over the judgments as against the purchase " money."

In *Codwise et al* v. *Gelston et al*, 10 Johnson, 522.

KENT, C. J., says, speaking of a similar case: "The " moneys arising on these sales remain subject to the same " liens that the lands did before the sales, and the Court, " by reference to a master, should have ascertained and " settled the priority of the liens, and decreed distribution " accordingly."

The remaining and most important question in the case is whether or not the appellants have by any means lost their right to be paid out of the funds in Court, in preference to the other creditors of the Railroad Company.

The Circuit Court allowed Foster, Bardwell and McComb to share in the fund as general creditors, and they appealed from that decision, because they were not allowed to come in as lien-holding creditors, and thus obtain full payment of their bonds.

McCollum was not allowed anything by the Circuit Court, and as his claims are much larger than all the others put together, they will be first considered.

His claims were stated to be as follows in the amended bill of complainant filed by him :—

" And your orator John V. McCollum represents that " he is the owner and holder of the construction bonds of " the Mississippi and Missouri Railroad Company num- " bered 421, 423, 592, 778, 1453, 1905, 2531, 2698, 2699, " 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2747, " each thereof being for the sum of one thousand dollars, " with the interest coupons appended to said bonds num- " bered from sixteen to forty, inclusive.

" Also of the second mortgage construction bonds of " said company numbered 592 and 778, each for the sum " of five hundred dollars, with the interest coupons ap- " pended thereto numbered from seven to forty, inclusive.

" Also of the income bonds of said company num-
72 " bered 148, 152, 153, 154, 155, 156, 157, 158, 200,
" 235, 236, 237, 238, 240, 252, and those numbered " from 159 to 198, both inclusive, each for the sum of one " thousand dollars, with all of the interest coupons ap- " pended thereto, being all of the coupons, excepting the " one maturing after the date of said bonds; that he is " also the owner and holder of other coupons than those " attached to the bonds above described, and which were " attached to the construction bonds of said Mississippi " and Missouri Railroad Company, which are all past due " & wholly unpaid: that said coupons so owned by him, " the numbers of the coupons, and the number of the " bonds from which they were detached are as follows :—

Number of coupons owned.	Their number.	Number of the bonds from which they were detached.
50	1	2658 to 2707, both inclusive.
38	2	2901 to 2945 " "
55	3	2946 to 3000 " "
36	2	3001 to 3036 " "
64	4	3037 to 3100 " "
15	2	3101 to 3115 " "
96	5	3116 to 3211 " "
78	6	3212 to 3290 " "
79	7	3291 to 3370 " "
7	2	3371 to 3377 " "
33	8	3378 to 3400 " "
57	9	3401 to 3457 " "
50	10	4051 to 4100 " "
50	11	4101 to 4150 " "
50	12	4151 to 4200 " "
50	13	4201 to 4250 " "
800		

" That no part of said bonds and coupons have been " paid; that neither he nor any other person or corpora- " tion in his behalf has ever made, assented, or agreed to " the arrangement or agreement hereinbefore recited for the " payment of said bonds and coupons by the payment of " a less sum than that due upon the face thereof, and that " he is now entitled to be paid the full amount stipulated " to be paid upon the face of said bonds and matured " coupons.

" And your orator further shows that the following " coupons, viz., one coupon detached from bond numbered " 3397, fifty coupons detached from bonds numbered 4051 " to 4100, both inclusive; fifty coupons detached from " bonds numbered 4101 to 4150, both inclusive; fifty " coupons detached from bonds numbered 4201 to 4250,
" both inclusive, were by mistake not signed by the
74 " secretary of said Railroad Company; but your
" orator alleges that said coupons and each of them " were attached to valid and duly-executed construction " bonds of said Railroad Company, of which Exhibit A of " said consolidated bill is a copy; that the bonds from " which said coupons were detached had been duly exe-

" cuted, and were at the time said coupons were detached
" therefrom valid unpaid, outstanding bonds of said Rail-
" road Company; and that said coupons have not, neither
" has any part thereof, been paid."

Record 406, pp. 22-25.

It was stipulated by the counsel for the respective parties, that the facts in regard to the history and ownership of these bonds are as follows:—

" 1. That the bonds claimed by the complainant Mc-
" Collum in the said consolidated bill were, at the time of
" the sale of the property of the Mississippi and Missouri
" Railroad Company, and for a long time prior thereto,
" the property of one Thomas C. Durant; that the said
" Durant continued to hold said bonds until after
" 116 the execution of the contract of August first,
" 1866, between the Stanton committee and the
" Chicago, Rock Island, and Pacific Railroad Company;
" that after the execution of said contract, and before the
" confirmation of the sale made under the foreclosure de-
" cree in the case of *Durant et al.* v. *the Mississippi and*
" *Missouri Railroad Company, et al.*, the said Durant
" threatened to delay the transfer of the property of said com-
" pany in accordance with the terms of the contract of No-
" vember 1st, 1865, and the said forclosure sale, by resist-
" ing the confirmation of said sale, and by other means, be-
" cause he was excluded by the notice of committee from
" assenting to P. Meyers' contract; that at the request of
" the said Chicago, Rock Island, and Pacific Railroad
" Company, one David Dows, then a director in said
" company, purchased said bonds, one of the inducements
" to the purchaser being a desire on the part of said
" Dows, and of said railroad company, to prevent any
" such hindrance and delay; that after the confirmation
" of said sale, the said Chicago, Rock Island, and
" 117 Pacific Railroad Company purchased said bonds
" of the said Dows, and paid him therefor the sum
" of fifty-four thousand two hundred dollars.

" 2. That the said railroad company continued to own
" said bonds until the date of the sale of the several cou-
" pons maturing November 1st, 1864, to John V. McCol-

" lum, as set out in another stipulation this day signed by " the parties; that said bonds when then sold, (when then " sold) by John F. Tracy to the said McCollum, the said " sale being a part of the same transaction in which said " coupons were sold."

Record 406, pp. 35-6.

The facts in regard to the history and ownership of the coupons, held by McCollum, were stipulated to be as follows:

See pp. 34 and 35.

NEW YORK, *December 26th*, 1865.

111 At a meeting of the executive committee of the Mississippi and Missouri Railroad Company held this day:

Present, John A. Dix, George W. Stanton, jr., B. Wilson, and John Elliott.

It was on motion resolved, that this committee deem it important, in order to assure the delivery of bonds of the Mississippi and Missouri Railroad to the Union Trust Company by parties outside of the Mississippi and Missouri, and the Chicago and Rock Island Railroad Companies, that the Chicago and Rock Island Railroad Company deposit the bonds held by them with as little delay as possible, and that said company be requested to do so.

VII. That thereafter and on the 21st day of January, A. D. 1866, the said treasurer of the said Chicago and Rock Island Railroad Company signed the name of the said company to the agreement between the bond and stockholders of the Mississippi and Missouri Rail-
112 road Company and George W. Stanton, jr., and John Elliott and Blakeley Wilson, committee, generally known as the Peter Meyer's contract, as follows: " Chicago, Rock Island, and Pacific Railroad Company, by E. W. Dunham, treasurer, land grant, first mortgage bonds, $800," as will more clearly appear by the copy of said contract in evidence, to which for greater certainty reference is hereby made, that after the release and prior to the signing of said agreement, and without notice to the

said committee or to the board of directors of the Mississippi and Missouri Railroad Company, the said E. W. Dunham detached therefrom the coupons maturing on the eighth day of November, A. D. 1964.

VIII. That the detached coupons described in the consolidated bill as amended, alleged to be owned by the said John V. McCollum, with the exception of the coupons detached from construction bonds numbered twenty-six, 98, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, and 2707, were detached from the said bonds so numbered.

113 IX. That after the said bonds were so surrendered the said John V. McCollum purchased said coupons of John F. Tracy, who was agent of the Chicago, Rock Island, and Pacific Railroad Company; that the said Tracy did not disclose the name of his principal or that he was acting as agent in said sale; that the said McCollum is a relative by marriage of the said Tracy—brother-in-law; that the said McCollum purchased said coupons on or about the 27th day of March, A. D. 1869, and executed his negotiable promissory note for the price agreed to be paid therefor, which was fifty per cent. of the amount due thereon, which note was payable with interest three years after said date; that said note is now held by the said Tracy, who is president of the said railroad company, and for the use of said company.

X. That the date of the release of the equity of redemption in said 800 bonds by the said Mississippi and Missouri Railroad Company, the said railroad company had failed to pay the installment of interest due on the loan of $500,000, on the first day of January, 1865,
114 and the same remained unpaid, and was unpaid when the release of the right to redeem the bonds was accepted.

XI. It is further stipulated that any ruling or decision which may be made by the court touching the coupons severed from the 800 bonds as hereinbefore recited shall embrace and apply to all severed coupons claimed by the said John V. McCollum.

XII. It is further stipulated that David Dows was a director in the Chicago and Rock Island Railroad at the

time of the transaction referred to by Frederick A. Foster in his deposition.

WITHROW AND WRIGHT,
For Complainants.

GRANT, *for Howard and Others.*

Endorsed: Filed October 29th, 1869.

It thus appears that the bonds and coupons held by McCollum, and presented for payment in this proceeding, are part of a legitimate issue of bonds with coupons attached, made by the M. & M. Railroad Company, and that in fact no holder of said bonds, nor any one for him, ever assented to the arrangement made October 20, 1865, for a sale of the property and franchises of the Company, and a compromise with the holders of its bonds for the amounts due upon them: In a word, McCollum's bonds and coupons have never been paid in whole or in part, nor has any one ever agreed to take less than the whole amount due upon them.

This clearly enough appears from the stipulations cited above, but the statement is fortified by the admissions made by the defendants in their answer to the consolidated bill of McCollum et al, that a certain number of the holders of the bonds of the M. & M. Railroad Company did not assent to the terms of sale, agreed upon October 20, 1865.

That admission is as follows:

In the suit of *Howard et als.* v. *Davenport et als.*, the Chicago, Rock Island and Pacific Railroad Company, through Ebenezer Cook, their Secretary, who was a witness, filed an account, and Ebenezer Cook declared on oath that it was wholly as it appeared; that the Chicago, Rock Island and Pacific Railroad Company had paid all the outstanding bonds, scrip, and interest on all the mort-

gage bonds of the Mississippi and Missouri Railroad Company, according to the scale provided by the terms of sale of October and November, 1865. If this account is true, then the plaintiffs' bonds, Foster and others, have
64 been surrendered by the holders to the Chicago, Rock Island and Pacific Railroad Company, have assented to the sale, got their pro rata share of proceeds, and their bonds and coupons extinguished. These defendants, on information and belief, answer that said account of payments was not true, and these defendants say that while they know some of the bondholders did not assent to the terms of sale, they aver that the number and amounts thereof, do not exceed the following account:

List of non-assenting bonds and stock of Mississippi & Missouri Railroad, according to the last accounts by the bond and stock book before same was taken by the Chicago, Rock Island & Pacific Railroad Company:

1st mortgage bonds.....	$17,000		
Income.....	18,000		
Interest.....	2,450		
		at scale..	$37,450
2nd mortgage bonds....	$1,000	@ 80c....	800
Oskaloosa division bond.	14,500		
Scrip.....	2,406,10		
	$16,906,10	@ 62½c..	10,566,31
Land grant construction:			
1st May.....	45,000		
65 Land grant construction income.	59,000		
	$104,000	@ 70c..	71,400
Land grant const.:			
2d mortgage.....	$23,500		
Scrip "	1,900		
	26,000	@ 30c...	7,920
Bonds and scrip.....	$174,500		
Total scale.....			$128,136,31

Assenting 28,000 shares. Which last sum of money the Chicago, Rock Island and Pacific Railroad Company

had on hand, if not paid out in redeeming the bonds not assenting.

It appears from the stipulation, that Thomas C. Durant was, for a long time before, and at the time of the foreclosure sale, the owner of the bonds now held by the appellant McCollum; that he did not assent to the arrangement for a sale of the road, nor agree to take less than the face of his bonds, and threatened to resist the confirmation and completion of the foreclosure sale, unless his bonds were paid, and to prevent such trouble, David Dows, one of the directors of the C. R. I. & P. Railroad Company, bought his bonds, and the Company repaid Dows the money he paid for them, amounting to fifty-four thousand two hundred dollars, ($54,200,) and these facts, taken in connection with the admission or statement in the answer, that there were nearly one hundred and seventy-five thousand dollars of non-assenting bonds, to the agreement made October 20, 1865, for a sale of the road and a compromise of its indebtedness, seem to clearly establish the proposition, that no part of the bonds held by McCollum have ever been paid, nor have the holders of them ever agreed to take less than their face, or to release their right to payment out of the proceeds of the sale of the property mortgaged to secure them.

It will hardly be contended that the arrangement of October 20, 1865, was binding upon anybody except those who were parties to it, and it seems clear that all non-assenting bondholders had the right to full payment of their bonds, if the mortgaged property should prove sufficient for that purpose, because the trustees named in the several deeds of trust did not attempt, on behalf of the bondholders, to make any compromise of the amount due

on their bonds, and no bondholder had authority to make any arrangement except in regard to his own bonds.

There remain these three inquiries in regard to the right of McCollum to recover the amount due upon his bonds, in whole, or in part: *First*, Is the fund now in Court to be deemed the proceeds of the property mortgaged to secure his bonds?

Secondly, Has he, or any prior holder and owner of the bonds, done any act whereby his right, in equity, to full or part payment of them, has been lost?

Thirdly, Whether his rights as a bondholder are or not superior to those of Howard et al, who have only simple contract claims against the M. & M. Railroad Company, or judgments upon simple contract debts, recovered long after the mortgages made to secure McCollum's bonds were made and placed on record?

First, is the fund now in Court to be regarded as the proceeds of the sale of the mortgaged property?

By the terms of the agreement of Oct. 20th, 1865, the C. & R. I. R. R. Co., agreed to give for all the property and franchises of the M. & M. R. R. Co. five millions five hundred thousand dollars.

(See the proceedings of the bond and stockholders' meeting in full, Record 344, pp. 30 32, folios 88 to 92.)

(See the agreement made by the C. & R. I. R. R. Co. with the M. & M. R. R., by which the former agreed to give $5,500,000 for "the entire property, real and personal," of the M. & M. R. R. Co., when the latter was able to transfer a perfect and unincumbered title to such property.)

No. 344, folios 104-5.

This transfer of the title to the property of the M. & M. R. R. Co. was to be made by means of a foreclosure of the mortgages then existing upon its property, and the C. & R. I. R. R. Co. agreed to cause a new company to be created and organized in the State of Iowa, for the purpose of buying that property at the foreclosure sale, for the price agreed upon, folio 105, Record 344.

The substance of this agreement was simply this: The M. & M. R. R. Co. was then a distinct corporation existing in the State of Iowa, and the C. & R. I. Co. was an Illinois corporation, but the two companies had very intimate relations, and were connecting lines. The M. & M. Co. was insolvent, and could not pay its interest on its bonded debt, while the other company was strong, solvent, and anxious to preserve its projected line of road to Omaha, which has since been built. A part of the stock and bondholders of the M. & M. Co. agreed to sell its property to a new company to be organized in Iowa and Illinois, which should own and operate the roads then belonging to the two companies, and pay to the bondholders and stockholders of the Iowa Co. $5,500,000 for its property which should be distributed, according to the terms of the agreement of Oct. 20th, 1865, among the parties assenting to that arrangement.

In a word, the entire property and franchises of the M. & M. Co. were to be sold to a new consolidated corporation, and the transfer and conveyance of the property was to be made by means of a sale under a foreclosure of the mortgages given by that company, to secure, among others, the bonds belonging to the appellant, McCollum.

This agreement for a foreclosure and sale was carried out, and the entire property of the M. & M. Co. brought to sale under a decree of foreclosure of the various mort-

gages given by that company upon its property and franchises, and the new consolidated company purchased the property at the master's sale on the 9th day of July, 1866, for two millions one hundred thousand dollars.

It has been stoutly contended during the progress of this litigation, that the M. & M. Railroad was sold for only two millions one hundred thousand dollars, and that sum having been exhausted in payment of encumbrances prior in date and order of payment, to those made to secure McCollum's bonds, that the fund now in Court, and the subject of this controversy not having been realized from a sale of the property of the M. & M. R. R. Co. is not in any manner liable for the payment of his bonds.

Equity looks to the substance, and not to the form or shadow of things. The agreement was to sell the entire property of that insolvent railroad company for $5,500,000; the C. & R. I. R. R. Co. agreed to find a purchaser for it at that price, and both parties agreed to have a foreclosure sale, as the means of transfering the title of the property to the purchaser; pursuant to that agreement, the foreclosure was made, and the property sold for a less price, to be sure, than the price agreed upon, but the parties in interest have ever since treated the sale as if made for the full sum agreed upon, and Howard et al, have no standing in Court, if the fund now in contest is not the proceeds, in whole or in part, of the sale of their debtor's property.

They have constantly alleged in their proceedings and pleadings in this case that it is, and that the sum of $2,100,000 bid at the master's sale was only a portion of the purchase money, paid for the property of the M. & M. R. R. Co.

In their original bill filed in this case, after setting up all the agreements and proceedings, in regard to the sale, they say:—

The said mortgages of the Mississippi and Missouri Railroad Company were foreclosed in this Court at the May term, 1866. The Chicago and Rock Island Company caused said new corporation to be created under the general incorporation laws of Iowa, called the Chicago, Rock Island, and Pacific Railroad Company. The franchises and all the property of the M. & M. Railroad Company were sold under said decree of foreclosure on the
16 ninth of July, 1866; and said Chicago, Rock Island, and Pacific Railroad Company became the purchaser under the agreement herein named, for the sum of two millions two hundred thousand dollars, and said sale is confirmed by this Court. The Mississippi and Missouri Railroad Company has, except for the purpose of closing its business, ceased to exist, and abandoned the purpose for which it was created. The said sum of two millions two hundred thousand dollars, bid at said sale, was not paid down, but the trustees, plaintiffs in that suit, gave a receipt to the officer conducting the sale for the amount without actual payment, and the said sum is to be paid as part and parcel of the five and one-half millions of dollars, the contract price between said railroad company and the Chicago and Rock Island Railroad Company, under the contract of first November, 1865, and as part of said sum is to be paid to the parties and in the manner required by said contract, and the resolutions of the stock and bond-holders of twentieth October, 1865, by which sixteen per cent. is to be paid on each share of stock.

Record No. 344, p. 5, folio 16.

Throughout all the proceedings, it is expressly admitted that the M. & M. R. R. Co.'s property was agreed to be sold, and was sold in fact to the C. R. I. & P. R. R. Co. for $5,500,000, and the latter company has been held responsible for that sum, as the price agreed to be paid for it.

Howard et al. sought by their original bill filed in this cause, to obtain payment of their demands against the M. & M. R. R. Co., out of the sum of $552,400, amount of 16 per cent. on the capital stock of that company, which, by the agreement of Oct 20th, 1865, was to be paid to the stockholders.

(See the terms of the agreement, Record No. 344, p. 31, folio 89.)

(See the allegations in the bill, same record, folios 14, 15, 19, 20, and the prayer of their bill, folio 21, that their claims may be paid out of the 16 per cent. reserved for the stockholders.)

The interlocutory decree in Howard's original suit finds that the sum of $552,400, agreed to be divided among the stockholders of the M. & M. R. R. Co. is a fund liable to be applied to the payment of the guaranteed debt of that company, a part of which is held by Howard et al.

Record 344, p. 86, folio 248.

But what puts this point beyond all further controversy, is the order of the Circuit Court, (as part of that interlocutory decree), appointing B. F. Allen to receive the bonds and money agreed to be paid to the stockholders, and hold it for the benefit of the parties to the suit of Howard et al. Same record, p. 87, folio 250.

It certainly does not become Howard et al. to claim that the fund now in controversy is not a part of the proceeds of the sale of the property and franchises of the M. & M. R. R. Co., for if it is not, then they have no claim upon it, because all the money realized at the Master's sale was, by him, paid out in satisfaction of the costs and claims presented and allowed in the forclosure suit.

(See his report of the application made by him, of the proceeds of the sale, showing that he paid $2,099,982 towards the costs and amount due to the bondholders, who were represented in that suit. Record 344, p. 241, folios 704-5.)

The final decree in the original suit of Howard et al. recites and finds that the M. & M. R. R. Co.'s property and franchises were sold for $5,500,000, and that Howard et al., as creditors, shall be paid out of the part of that sale a sum equal to $541,527 net, agreed to be paid to the stockholders.

Record 344, p. 110, folios 310-311.

That decree was affirmed, both as to matters of law and fact, in 7 Wallace, 414, *Railroad Co.*, v. *Howard et al.*

The foreclosure sale was made in July, 1866, and in May, 1867 the special Master made his report of the distribution and payment of the proceeds of the sale.

Record 344, p. 241, folio 702.

After that report was made and confirmed, on the 30th October, 1867, Allen was appointed receiver in the original suit of Howard et al. See the order of his appointment.

Record 344, p. 87, folio 250.

On the 28th Oct., 1868, Allen reported that he had received $450,000 of the fund of which he was appointed to take charge, and soon after he reported that he had received the balance, making in all $541,465.46, in his hands, and subject to the order and decree of the Court, in the suit of Howard et al..

Record 344, pp. 247, folio 722.

With this showing from the records of these cases, it seems difficult to understand how the defendants in this suit (Howard et al.) can make, or expect to prove the state-

ments, in their answer to the bill of McCollum et al, upon this point, which are as follows:

42 It is also true that in pursuance of said decree of foreclosure, and in compliance with the terms thereof, said mortgaged property was sold on the ninth day of July, 1866, by a special master appointed for that purpose, and that the Chicago, Rock Island and Pacific Railroad Company became the purchaser thereof in different parcels, for the aggregate sum of two millions one hundred thousand dollars; but is not true that the actual sum agreed to be paid under said foreclosure suit for said property was the sum of five millions five hundred thousand dollars. It is not true that the amount bid was nominal merely. It is not true that the real agreement and understanding between the parties was that the purchaser was to pay for the title acquired thereby the said sum of five millions five hundred thousand dollars. It is not true that said sum of two millions one hundred thousand dollars bid at said sale was not paid, but the trustees in whose favor the decree of foreclosure was made, gave a receipt to the officers without actual payment.

43 It is true that there was no payment to the officer by the purchaser, nor by the trustees; but there was payment by or on behalf of the purchaser to the trustees.

It is not true that the same was treated by the trustees or purchaser as part of the five millions five hundred thousand dollars which it had been agreed should be paid for the property. It is not true that said trustees have never had, in their own hands, any of the moneys arising from said sale; and it is not true that all of the disbursements which had been made to the holders of bonds entitled thereto, have been made by the Chicago, Rock Island and Pacific Railroad Company, and applied on said sum of five millions five hundred thousand dollars, agreed, as aforesaid, to be paid for said mortgaged property. It is not true that any agreement was made by said Chicago and Rock Island Railroad Company, or any other person, to bid five millions five hundred thousand dollars at said foreclosure sale for said property.

* * * * * * *

It is true that the complainants and intervenors in the bill of Howard et al. have filed a bill in this court to subject the fund to be paid to the stockholders of the Mississipppi and Missouri Railroad Company, under an agreement therein referred to, to the payment of certain guaranteed bonds held by them, and that certain moneys and bonds have been paid to a receiver in this court. The plaintiffs Foster et al. make the record of said case a part of their bill, and these defendants make it part of their answer, and refer to the facts in said cause as a part of their answer in this. It is not true that the funds in the hands of the receiver is now held by him, under the orders and instructions of this court, is a part of the proceeds of said mortgage sale, or is in any way connected therewith; on the contrary, the whole fund arising from the mortgage sale has been delivered to the several trustees or their agents, and has been distributed by them or their agents to the persons entitled thereto, or held in trust for them, when not distributed.

Record 406, pp. 13, 15, folios 42, 43, 49, 50.

The object of making these allegations, is doubtless to support the argument, that as the fund in the hands of the receiver is not specifically part of the proceeds of the master's sale, therefore the appellants have no claims upon it.

But it is insisted for the appellants, that the master's sale was only the means of transferring the title to the property which was sold for $5.500,000, and it does not matter what sum was bid at the master's sale, nor what has become of the $2,100,000 bid and paid, or agreed to be paid, at that sale. The plain fact and the substance of the transaction is, that the M. & M. R. R. Co.'s property was sold for $5,500,00, and all parties have assented to the sale, and the purchase money stands in place of the property which was sold; while Howard et al. claim, as general creditors, that portion of it which was to go to the

stockholders by the terms of the agreement for a sale to the company, which was to be organized to buy it.

In a word, Howard et al. are by their own averments and proceedings in the records of these cases, estopped to deny that the fund now in controversy, stands in place of the property and franchises of the M. & M. R. R. Co. and is liable to the claims of the creditors of that company; the only question is, whether they or the appellants have the better right to it.

For the future it will be assumed in this argument, that the fund now in Court is that part of the proceeds of the sale and transfer of the property and franchises of the M. & M. R. R. Co. which was to go to the stockholders of that company by the terms of the agreement for a sale, and is liable to be applied in payment of the debts of that company, as the Court shall determine their order or priority.

II.

Has McCollum, or have any of the appellants, done any act whereby their right in equity to full or part payment of their bonds, out of the fund in Court, has been lost?

His bonds and coupons are described as follows in his amended bill:—

> And your orator John V. McCollum represents that he is the owner and holder of the construction bonds of the Mississippi and Missouri Railroad Company numbered 421, 423, 592, 778, 1453, 1905, 2531, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2747, each thereof being for the sum of one thousand dollars, with the interest coupons appended to said bonds numbered from sixteen to forty, inclusive.

Also of the second mortgage construction bonds of said company numbered 592 and 778, each for the sum of five hundred dollars, with the interest coupons appended thereto numbered from seven to forty, inclusive. Also of the income bonds of said company numbered 148, 152, 153, 154, 155, 156, 157, 158, 200, 235, 236, 237, 238, 240, 252, and those numbered from 159 to 198, both inclusive, each for the sum of one thousand dollars, with all of the interest coupons appended thereto, being all of the coupons, excepting the one maturing after the date of said bonds; that he is also the owner and holder of other coupons than those attached to the bonds above described, and which were attached to the construction bonds of said Mississippi and Missouri Railroad Company, which are all past due and wholly unpaid; that said coupons so owned by him, the numbers of the coupons, and the number of the bonds from which they were detached are as follows:

72

Number of coupons owned.	Their number.	Number of the bonds from which they were detached.
50.....	1.....	2658 to 2707, both inclusive.
38.....	2.....	2908 to 2945 " "
55.....	3.....	2946 to 3000 " "
36.....	2	3001 to 3036 " "
64.....	4.....	3037 to 3100 " "
15.....	2.....	3101 to 3115 " "
96.....	5.....	3116 to 3211 " "
78.....	6.....	3212 to 3290 " "
79.....	7.....	3291 to 3370 " "
7.....	2.....	3371 to 3377 " "
33.....	8.....	3378 to 3400 " "
57.....	9.....	3401 to 3457 " "
50.....	10.....	4051 to 4100 " "
50.....	11.....	4101 to 4150 " "
50.....	12.....	4151 to 4200 " "
50.....	13.....	4201 to 4250 " "
800		

That no part of said bonds and coupons have been paid; that neither he nor any other person or corporation in his behalf has ever made, assented, or agreed to the arrangement or agreement hereinbefore recited for the payment of said bonds and coupons by the payment of a less sum

than that due upon the face thereof, and that he is now entitled to be paid the full amount stipulated to be paid upon the face of said bonds and matured coupons.

And your orator further shows that the following coupons, viz., one coupon detached from bond numbered 3397, fifty coupons detached from bonds numbered 4051 to 4100, both inclusive; fifty coupons detached from bonds numbered 4101 to 4150, both inclusive; fifty coupons detached from bonds numbered 4201 to 4250, both inclusive, were by mistake not signed by the secretary of said
74 railroad company; but your orator alleges that said coupons and each of them were attached to valid and duly-executed construction bonds of said railroad company, of which Exhibit A of said consolidated bill is a copy; that the bonds from which said coupons were detached had been duly executed, and were at the time said coupons were detached therefrom valid, unpaid, outstanding bonds of said railroad company; and that said coupons have not, neither has any part thereof, been paid.

Record 406, p. 22, folios 71-2-3.

It was stipulated that the bonds, coupons, and scrip alleged in the consolidated bill to be owned by the complainants Foster, McCollum, et al, were in their possession at the time of the hearing.

Record 406, p. 37, folio 121.

This is equal to saying, or admitting, that McCollum had in his possession, and claimed to be the owner of the bonds and coupons described in his amended bill, at the time it was filed.

It is admitted in the answer to the consolidated bill of the appellants, that there was an amount of non-assenting bonds and scrip, far greater than the amount of those held by the appellants.

That admission is as follows:—

In the suit of Howard et al v. Davenport et al, the Chicago, Rock Island, and Pacific Railroad Company, through Ebenezer Cook, their secretary, who was a witness, filed an account, and Ebenezer Cook declared on oath that it was wholly as it appeared; that the Chicago, Rock Island, and Pacific Railroad Company had paid all the outstanding bonds, scrip, and interest on all the mortgage bonds of the Mississippi and Missouri Railroad Company, according to the scale provided by the terms of sale of October and November, 1865. If this account is true, then the plaintiffs' bonds, Foster and others, have been surrendered by the holders to the Chicago, Rock Island, and Pacific Railroad Company, have assented to the sale, got their *pro rata* share of proceeds, and their bonds and coupons extinguished. These defendants, on information and belief, answer that said account of payments was not true, and these defendants say that while they know some of the bondholders did not assent to the terms of sale, they aver that the number and amounts thereof do not exceed the following account:—

64

List of non-assenting bonds and stock of Mississippi and Missouri Railroad according to the last accounts by the bond and stock book before same was taken by the Chicago, Rock Island, and Pacific Railroad Company.

1st mortgage bonds.....	$17,000		
Income.....	18,000		
Interest	2,450		
		at scale	$37,450
2nd mortgage bonds	1,000	@ 80c	800
Oskaloosa division bond..	14,500		
Scrip.....	2,406 10		
	$16,906 10	@ 62½	10,566 31
Land grant construction:			
1st May.....	$45,000		
Land grant construction, income	59,000		
	$104,000	@ 70c	71,400

Land grant const.:			
2nd mortgage.....	$23,500		
Scrip "	1,900		
	26,000	@ 30c	7,920
Bonds and scrip.....	$174,500		
Total scale.....			$128,136 31

Assenting 28,000 shares. Which last sum of money the Chicago, Rock Island, and Pacific Railroad Company had on hand, if not paid out in redeeming the bonds not assenting.

Record 406, pp. 19, 20, folios 64, 65.

By the terms of the agreement for a sale of the M. & M. R. R. Co.'s property and franchises, there was to be paid, on the several classes of bonds held by McCollum, the following rates per cent., as is admitted by Howard et al in their answer to the consolidated bill of Foster et al:

At a meeting of the stock and bondholders held in New York, on the 20th of October, 1865, it was resolved to sell the road and franchises to the Chicago and Rock Island Railroad Company, for five million five hundred thousand dollars, upon condition that the distribution of the same should be made according to the following scale:

First mortgages.....	$1,000,000		
Income bonds.....	214,000		
Interest to July 1, 1868.....	42,490		
			$1,256,490
Second mortgage.....	$400,000	@80c,	320,000
Oskaloosa division bonds....	590,000		
Income bonds.....	73,000		
Scrip.....	2,939		
	665,936	@62½c,	416,210
Land grant div. bonds.....	$3,612,000		
Income	253,000		
Scrip.....	12,550		
	$3,878,550	@80c,	2,714,635

Second mortgage construction, or fifth mortgage.....	691,000	
Scrip.....	2,764	
	693,764@30c,	208,129
Capital stock.....	$3,452,500@16c,	552,400
To pay expenses of foreclosure mortgages.....		32,000
		$5,500,000

That, at said meeting B. Wilson, G. W. Stanton, and John Elliott were appointed a committee or trustees to arrange the mode and terms of payment with the Chicago and Rock Island Railroad Company, and to arrange with some trust company to receive the bonds and stock of the parties assenting, and issue certificates therefor, setting forth what the holder was entitled to receive.

Record 406, p. 17, folio 56.

By another stipulation, in the same record, it was agreed that McCollum's bonds were at the time of the master's sale of the property of the M. & M. R. R. Co., and for a long time prior thereto, the property of one Thos. C. Durant, and, in substance, that neither he nor any other holder and owner of them, ever assented to the arrangement of Oct. 20th, 1865.

For convenience, that stipulation is here cited again in full:

MARK HOWARD ET AL
ag't.
THE CITY OF DAVENPORT ET AL.

It is stipulated between the complainants in the consolidated bill of Frederick A. Foster et al. in the above entitled cause, and defendants who have answered thereto, except the Chicago, Rock Island and Pacific Railroad Company, that upon the hearing of the issues joined on the allegations of said consolidated bill the following facts shall be considered established by the evidence:

1. That the bonds claimed by the complainant McCollum in the said consolidated bill were, at the time of the sale of the property of the Mississippi and Missouri Railroad Company, and for a long time prior thereto, the property of one Thomas C. Durant; that the said
116 Durant continued to hold said bonds until after the execution of the contract of August first, 1866, between the Stanton committee and the Chicago, Rock Island and Pacific Railroad Company; that after the execution of said contract, and before the confirmation of the sale made under the foreclosure decree in the case of *Durant et al* v. *The Mississippi and Missouri Railroad Company et al*, the said Durant threatened to delay the transfer of the property of said company in accordance with the terms of the contract of November 1st, 1865, and the said foreclosure sale, by resisting the confirmation of said sale, and by other means, because he was excluded by the notice of committee from assenting to P. Meyers' contract; that at the request of the said Chicago, Rock Island and Pacific Railroad Company, one David Dows, then a director in said company, purchased said bonds, one of the inducements to the purchaser being a desire on the part of said Dows, and of said railroad company, to prevent any such hindrance and delay; that after the confirma-
117 tion of said sale, the said Chicago, Rock Island and Pacific Railroad Company purchased said bonds of the said Dows, and paid him therefor the sum of fifty-four thousand two hundred dollars.

2. That the said railroad company continued to own said bonds until the date of the sale of the several coupons maturing November 1st, 1864, to John V. McCollum, as set out in another stipulation this day signed by the parties; that said bonds when then sold, by John F. Tracy to the said McCollum, the said sale being a part of the same transaction in which said coupons were sold.

WITHROW & WRIGHT,
For Complainants.

GRANT & SMITH,
For Mark Howard and others.

Record 406, pp. 35-6, folios 116, 117.

Thus far, then, it is conclusively shown that McCollum's bonds were issued by the M. & M. R. R. Co.; that they were secured by mortgages upon its property prior in time to the judgments and claims of Howard et al; that neither he nor any prior holder and owner of them has ever agreed to "scale" them or to take less than their face, and that they have not been paid.

Now, why should they not be paid out of the fund in Court, realized by a sale of the property mortgaged to secure their payment?

It will be answered by the appellees: Because of the proceedings of the Chicago, R. I. & P. R. R. Co. in regard to them.

It must be admitted that while Durant held the bonds, he had a right to enforce full payment of them out of the mortgaged property, or its proceeds, if they were sufficient for that purpose.

It is further to be considered that payment of these bonds is not resisted by any one having older claims against the M. & M. R. R. Co. than those of the appellants, but by judgment and simple contract creditors whose claims are of a much later date than the bonds and mortgages made by the railroad company, and not only that, but some of the claims presented by the appellees, and allowed to them, were not due at the time of their allowance, nor are they due now.

The whole property of the M. & M. R. R. Co. was mortgaged to secure the payment of its bonded debt, and was all sold for $5,500,000; a part of that sum is now in Court, and appellants present for payment bonds secured by those mortgages, and payment is resisted, not by parties having superior or equal liens upon the property of the M.

& M. R. R. Co., but by general creditors of that company, some of whom have, and some have not, reduced their demands to judgments, and some of whose demands are not due yet.

See the statement of the nature of Howard's and Weber's claims in Record 344, p. 2, folio 6, showing that their claims are founded upon the guarantee by the M. & M. R. R. Co. of bonds issued by various cities and counties in the State of Iowa, which had issued their bonds to the railroad company in payment for the stock of the company, and made default in the payment of the interest on them.

These creditors are seeking payment of their claims, out of that part of the purchase money set apart for the stockholders of the M. & M. R. R. Co.; but the stockholders are not entitled to anything until the bonded debt is all paid, even by the terms of the agreement of Oct. 20, 1865, nor in equity, until *all* the corporate debts are paid.

It was insisted in the beginning of this argument, and the point is now repeated, that neither the simple contract creditors, nor subsequent judgment creditors, nor the stockholders, are entitled to any share of the money or funds representing the railroad property, mortgaged to secure the payment of the bonds, until all the bonds are paid, or the claims of the bondholders released.

This point was expressly decided when the case first came before the Court, in 7 Wallace. (See the opinion of the Court, pp. 413–415.) And the other cases already cited in this argument are to the same effect.

To put it plainly, Howard et al are not entitled to any payment out of the funds in Court until all the bonds are paid or discharged, nor should they be heard to object to any arrangement made between the bondholders

for the payment of their bonds, which does not impair or diminish the fund liable for their payment.

If McCollum's bonds have not been paid, and are not subject to any agreement to take less than their face—then Howard et al have no right to object to their payment out of a fund derived from a sale of the property mortgaged to secure them.

The bond creditors should be paid first. If anything remains, then the general creditors of the Railroad Company should be paid in the order of their claims, as they shall be marshalled by the Court, but, until the bonds are all paid or released, the general creditors have no right to be heard in regard to the disposition of the fund, except to see that only genuine and unpaid bonds are presented for payment.

With these views of the law, it only remains to inquire what have been the dealings of the parties in regard to the bonds now held by McCollum.

It is stipulated in this case that they once belonged to Thomas C. Durant, who held them for a long time before the Master's sale, and threatened to resist the confirmation of that sale, because he was excluded from the benefit of the Peter Meyers' contract, (Oct. 20, 1865,) pp. 35–36, folios 116–7.

This shows, conclusively, that *he* never agreed to take less than the face of his bonds, and that they were not covered by that contract, and so far, his right to have full payment of them, is established by the decision of this Court in 7 Wallace.

It next appears by the same stipulation, that, to prevent Durant from resisting the confirmation of the Master's

report of sale, David Dows, one of the directors of the Chicago, R. I. & P. Railroad Company, purchased the bonds of Durant, one of the inducements being to prevent any hindrance or delay of the confirmation of the Master's report of the sale.

This was not an improper purpose on the part of either Dows or the C. R. I. & P. Railroad Company, which had then, pursuant to the agreement between it and the other parties to these proceedings, purchased the M. & M. Railroad Company's property and franchises, and entered upon the performance of its contract for so doing.

It is to be observed that Howard et al do not, and never did, claim in opposition to the sale of the railroad property, but under and according to it. They have not, and never had, any claims or liens upon the railroad property, except subject to the mortgages thereon to secure, among others, the McCollum bonds; and it does not impair or affect their rights as against the railroad property, that the bondholders insist upon their legal priorities upon it, for in any event the bonds must be paid before the general creditors, and when those creditors claim, under the agreement for a sale of the railroad property, the share set apart to the stockholders by the terms of that agreement, they are only entitled to insist that all *consenting bondholders* abide by their agreement to take the "scale prices" for their bonds, and cannot object that *non-assenting* bondholders insist upon their right to full payment out of the mortgaged property, for the legal rights of Howard et al are not thereby impaired or changed.

Therefore, McCollum's right to full payment of his bonds is not affected by the fact that the C. R. I. & P. Railroad Company, or Dows, bought them of Durant, to

prevent his opposition to the confirmation of the Master's sale.

It is not pretended that McCollum has ever waived or released his right to full payment of his bonds, but that he is not entitled to payment of them because they were once held by the C. R. I. & P. Railroad Company, and that Company could not enforce them in its own name, nor give McCollum any right to do so, in his name, for his own benefit.

There is no pretence that, considered in and by themselves, the bonds ought not to be paid, but that there is a sort of personal disability in the present or prior holders of them, which destroys all their rights to payment out of the fund now in Court.

This ground of defence rests upon the agreements made by the C. R. I. & P. Railroad Company with the Stanton committee and with the M. & M. Railroad Company, before and after the Master's sale.

The origin and creation of the Stanton committee and the Chicago, Rock Island and Pacific Railroad Company, is as follows: referring to the record No. 344, p. 30, fol. 88, from which it appears that on the 20th of October, 1865, at a meeting of the bond and stockholders of the M. & M. Railroad Company, it was agreed to sell the property and franchises of that company for the round sum of $5,500,000 to the Chicago and Rock Island Railroad Company, unless $1,500,000 could be immediately provided by the bond and stockholders for the completion and equipment of the M. & M. Railroad to Des Moines, in the State of Iowa, and a plan of distribution among the stock and bondholders of the M. & M. Railroad Company,

of the price to be paid, was agreed upon, which is set out on p. 31, fol· 89, and has been herein before referred to.

This plan of sale and distribution, is frequently, by the counsel for the appellees, called the " Peter Meyers' agreement," and was adopted by the parties present and represented at that meeting.

Upon the same day (p. 33, fol. 94 and following), Gen. Dix, the president of the M. & M. Railroad Company, issued a circular letter, setting out the history and then present financial condition of the company, and recommended the adoption and execution of the plan which had been reported for the sale and re-organization of the company. At that time the Chicago and Rock Island Railroad Company was a strong, solvent corporation existing in the State of Illinois, and running from Chicago to Rock Island, where, by means of the Rock Island bridge over the Mississippi river, it connected with the M. & M. Railroad Company, then in course of construction westward by way of Des Moines to Omaha.

The Iowa corporation, being insolvent and unable to prosecute the work of construction, naturally sought the assistance of the Illinois corporation, and it was for the interest of the latter company to afford the needed assistance so far as was within its corporate powers and financial ability ; but being an Illinois corporation, it could not, except by lease, or by means of an organization under the laws of Iowa, construct, operate and own a road in the latter State, and therefore it was agreed that a new consolidated company should be formed under the laws of both States (as has been done in a great many other instances and States), to complete, own and operate a continuous line of road from Chicago, by way of Rock Island

and Des Moines, to Omaha; accordingly, on the same day, articles of agreement were signed by Gen Dix, president of the M. & M. Railroad Company, and C. W. Durant, president of the Chicago and Rock Island Railroad Company, (pp. 36-7-8, fols. 104 and following), whereby it was agreed, in article one, that the M. & M. Railroad Company should at once procure a foreclosure of the mortgages upon its line of road, its lands, depots, equipments, etc., so that the purchaser should be able to transfer a perfect title to such incorporated company in Iowa, as the Chicago and Rock Island Railroad Company might designate to become the purchaser and owner thereof.

By article two, the Chicago and Rock Island Railroad Company agreed that within one year from Dec. 1, 1865, it would cause a company to be incorporated in the State of Iowa, to purchase said property for the sum of $5,500,000, and by article third the Chicago and Rock Island Railroad Company agreed to use all possible exertion to procure the necessary power and authority, legislative and otherwise, to consolidate the said Chicago and Rock Island Railroad Company with the company incorporated in Iowa, so as to make one company, whose line of road, under some other name, should extend from Chicago to Des Moines, etc.

By article six of the same agreement, (folio 108), it was agreed that the C. & R. I R. R. Co. should have possession of and operate the M. & M. Railroad Company on and after the first day of December, 1865, and that it should pay interest upon the sum of $5,500,000 from that date.

It is sufficient to say, that afterwards a new company was organized in the State of Iowa, according to the terms of this agreement, which was consolidated with the C. & R. I. Company of Illinois, and the two were thereafter and

ever since known as "The Chicago, Rock Island and Pacific Railroad Company," which became the purchaser of the property and franchises of the M. & M. Railroad Company, at the Master's sale, in July, 1866.

For the purpose of carrying out these arrangements, "Peter Meyers and others, subscribing holders of the "stock and bonds" of the M. & M. Railroad Company, who had assented to the proposed arrangement for the sale of the property of that company, appointed a committee consisting of George W. Stanton, George Elliott and Blakely Wilson, known throughout these proceedings as "The Stanton Committee," to act for and on their behalf in carrying out the agreement, and making the necessary arrangements on behalf of the assenting stock and bondholders, to carry it into effect.

This agreement will be found in record 344, p. 39, fols. 113 and 114.

It is not necessary to quote that agreement in full, but we note these points, appearing upon the face of it; that the M. & M. Railroad Company, its franchises and equipments, were to be sold for $5,500,000, and the proceeds of the sale distributed according to the "scale" agreed upon at the meeting of the 20th of October, 1865; that the consenting stock and bondholders agreed to the sale of the road upon those terms, and to surrender their bonds and certificates of stock into the hands of the Union Trust Company of New York, to be held by that company as the financial agent of said committee, for the purpose of carrying out the sale and foreclosure aforesaid; the committee agreed to use all diligence in foreclosing the mortgages then encumbering the title of the railroad property, and to convey the same according to the terms of the

agreement between said railroad companies, hereinbefore set forth ; and distribute the proceeds of the sale among the bond and stockholders, according to the terms of the agreement for that purpose, the said committee to be free from all responsibility except that they were to act fairly, honestly, and in good faith in discharge of their trust.

It is clear that this was a fair, open, and probably judicious arrangement to rescue the insolvent M. & M. Railroad Company from its embarrassments, though at some loss to the stock and bondholders, and secure the final completion of the enterprise. Indeed, it seems to have met the approbation of this Court, for in the report of the case, in 7 Wallace, the Court say on p. 415: "Prompt "payment was secured by the bondholders, and it is "highly probable that they received by that arrangement "a larger portion of their claims than they could have ob- "tained in any other way." But while this is true, it is equally clear and true, that no stockholder or bondholder was bound by that agreement, except he consented thereto; that no stock or bondholder could, without express authority for that purpose, or subsequent ratification of an act assumed to be done on his behalf, be bound to take the "scale" price for his bonds or stock, and the Stanton committee had no power or authority to act on behalf of any except the consenting stock and bondholders. Therefore, Durant, the holder at that time of McCollum's bonds, was not bound by this agreement, nor were his bonds affected by it, unless he, or some subsequent holder of them, assented to the arrangement, which we say was never done.

The consolidation between the Iowa and Illinois corporations appears to have been consummated pursuant to the

agreements, and is set out in full, record 344, pp. 42 to 44, fols. 121 and following. Such were the rights and relations of the respective parties in the fall of 1865; and in conformity to these agreements, suits were begun in the Circuit Court of the United States for the district of Iowa, for the foreclosure of the mortgages upon the property of the M. & M. Railroad Company, and decrees for foreclosure and sale were entered at the May term, 1866, and on the 9th day of July, 1866, the master of the Circuit Court, pursuant to the decree, sold the mortgaged property to the Chicago, Rock Island and Pacific Railroad Company in different sections, according to the mortgages made upon it, for the total sum of $2,100,000, and deeds were executed therefor. As already stated, the sum of $2,100,000, received by the Master at that sale, was all paid out by him, or accounted for as in fact paid out, upon the mortgages to the bondholders of the earlier mortgages upon the company's property, as appears by his report in record 344, (pp. 242 and 243 and following), leaving a balance of $3,400,000 of the purchase money, agreed to be paid by the Chicago and Rock Island Railroad Company, to be distributed among the stock and bondholders assenting to the agreement of October 20th, 1865, according to the terms of that agreement. But the distribution of the 16 per cent. awarded to the stockholders, amounting to $552,400, was arrested, and has hitherto been prevented by the suit begun on the 9th day of July, 1866, (the same date as the Master's sale), by Mark Howard and others, to compel its application to the satisfaction of their claims against the railroad company.

The next agreement between the parties, which it is necessary to notice, will be found in record 406, p. 40, folio 130, dated July 3d, 1866, which is in substance an agree-

ment between Cook, Tracy, Dows and Sturgis, who appear to have acted on behalf of the Chicago, Rock Island and Pacific Railroad Company, and the Stanton committee; that said railroad company should purchase the property of the M. & M. Railroad Company for $5,000,000, if it could be bought for that price at the sale which was shortly to take place under the decree of foreclosure, and which did occur on the 9th of July following. By another memorandum of the same date, signed by Tracy, as president of the Chicago, Rock Island and Pacific Railroad Company, it appears that the company agreed to give the committee $5,500,000 in first mortgage bonds of the Chicago, Rock Island and Pacific Railroad Company in case they should bid in the property of the M. & M. railroad for $5,000,000. An explanatory agreement, signed by the Stanton committee, dated July 9th, 1866, the day of the sale, will be found on p. 42, folio 138, showing that the trustees were to receive whatever might be the amount of the bid at the Master's sale, the sum of $5,500,000 from the new company which should become the purchaser at that sale. The property of the M. & M. Railroad Company having been sold on the 9th of July, 1866, and conveyed to the Chicago, Rock Island and Pacific Railroad Company, the latter then became liable to pay the sum of $5,500,000, according to the terms of the agreement of October 20th, 1865, and the several agreements and general understanding existing between all parties in interest down to that time. The new company came at once into possession of the property purchased at the Master's sale, and has ever since continued to hold and own it. By its situation it was likely that it would be more familiar with the transactions and business of the old company than the members of the Stanton committee; and for what may be supposed appeared

to the parties good and sufficient reasons for so doing, an agreement was made between that committee and the new company, whereby the latter assumed the duty which rested on the committee, of disbursing the funds among the share and bondholders of the M. & M. Railroad Company who had assented, or should assent, to the agreement of Oct. 20th, 1865. That agreement, between the committee and railroad company, will be found in record 406, p. 44, folios 145 to 150. After the preliminary recitals, the agreement shows (fol. 146) that the railroad company agreed as the agent of the party of the second part (the committee), to distribute the new bonds with interest from the 1st of December, 1865, and to fulfill all the obligations contained in the said agreement of the said committee with Peter Meyers and others. It being understood that the distribution of the bonds should be made within the time, and subject to the agreement of July 3d, between the same parties.

In folio 147, it is stipulated that the railroad company shall pay all the costs and expenses of the purchase and sale of the property of the M. & M. Railroad Company, giving to the plaintiffs in the foreclosure suits, (being the trustees of the bondholders), all that they should be respectively entitled to, according to the agreement of Oct. 20th, 1865, and pay to the party of the second part—that is, the Stanton committee—"21 bonds of $1,000 each, of "the kind and description mentioned in an agreement of "the M. & M. Railroad Company, dated Nov. 1st, 1865, "as a proper compensation for their services as said com- "mittee. And finally that the parties of the first part "(the Railroad Company) shall hold harmless, and protect "the party of the second part—that is, the committee— "and each of them, from any liability, claim, demand, or

" suit arising from any matters contained in said agree-
" ment with P. Meyers and others."

In folios 148 and 9, it further appears that the sale of the property of the M. & M. Railroad Company was, by the parties at that time, understood to have been made for the sum of $5,500,000, to be paid "in bonds " of the contemplated issue, and not otherwise." The spirit and purpose of this agreement is best expressed by the following quotation from its terms: "It being the " general scope and understanding of this agreement that " the Chicago, Rock Island, and Pacific Railroad Com-" pany, having by this agreement assumed all the liabili-" ties and obligations of Messrs. Stanton, Wilson, & El-" liot, committee, the said company should have all the " rights and privileges of the committee into whose place " the company steps. And it being understood that noth-" ing herein contained is intended to give to the party of " the first part any right, sanction, or color of right, to de-" lay, under any circumstances, the payments of coupons " or interest warrants on the bonds of the new issue, to be " distributed among the holders of bonds or stocks of the " M. & M. Railroad Company, as provided by all previous " agreements hereinbefore mentioned." Whatever may have been the last negotiation or proposition of the respective parties to these contracts, at or about the time they were made, it is a familiar rule of law, that, in the agreements themselves, as finally reduced to writing and executed, we must seek for the intention of the parties, and the terms of their agreements must establish their liability.

By the stipulation, already twice cited in this brief, in regard to McCollum's bonds, it is shown that one Thomas

C. Durant was the holder and owner of them until after the execution of the contract of August 1st, above referred to, and it has been demonstrated in this brief that he never assented to the arrangement of Oct. 20th, 1865; the stipulation also shows that he threatened to delay the transfer of the property of the M. & M. Railroad Company by means of the foreclosure sale, by resisting the confirmation of it, and by other means, because he was excluded by the notice of the committee, from assenting to Peter Meyers' contract. It was his right, if he saw fit, and within his power, to have appeared and resisted the confirmation of the Master's sale of the property of the M. & M. Railroad Company. Whatever might have been the effect of his resistance, it would undoubtedly have delayed the completion of the arrangements, and, if successful, it would have frustrated them, and thus, what appeared a judicious and desirable arrangement for all parties in interest, would have been defeated. This was his right, doubtless it was within his power, but the C., R. I., & P. Railroad Company having then bid off the property, and made arrangements to carry out its contract, for so doing, doubtless was anxious to complete the same, and so doubtless were the other parties in interest. David Dows, one of the directors of that company, purchased the bonds of Durant, one inducement of the purchase being a desire on his part, and of the Railroad Company, to prevent such hindrance and delay. In this there was nothing illegal or fraudulent, or so far as we can see, anything which could in any degree prejudice the rights of Howard & Co., who, at that time, were neither bond or shareholders of the M. & M. Railroad Company, but judgment creditors for comparatively small amounts.

The Railroad Company, as further appears from the stipulation, after the confirmation of the sale, purchased the bonds of Dows, and paid him therefor the sum of $54,200, and continued to hold them until they were sold to the appellant, McCollum, in the manner stated in the other stipulation. Now, if there was nothing illegal or improper in this purchase of Durant's bonds by the Railroad Company, considered in and by itself, and the purpose for which it was made, it does not appear how it could, in any manner, tend to the prejudice of the appellees, Howard et al.; and as no assenting bond or shareholder has made any objection to the purchase, the parties who afterwards became the holders and owners of the bonds, should not lose their right to payment of the same, in whole or in part, out of the fund in Court, realized from a sale of the property mortgaged for their security.

It was the duty of the Stanton committee to perform the agreement of Oct. 20th, 1865, according to its terms, as to all persons who should become parties to it. They could not compromise or affect the rights of non-assenting stock and bond-holders. The C., R. I., and P. Railroad Company, by the terms of its agreement with the Stanton committee, dated Aug. 1st, 1866, only agreed to perform and discharge the duties and obligations of that committee, and for the common good of all the parties assenting to the arrangement, the hostility of Durant, then the holder of McCollum's bonds, to the completion of the arrangement, was quieted, by buying up his bonds; and is it, therefore, inequitable to allow those bonds to be paid, in whole or in part, out of the fund in Court, because it was made by a director of the C., R. I., & P. Railroad Company, or because that company afterwards took the bonds of Dows, and paid him for them?

The records in these cases fail to show that these bonds have ever been paid, or that any part of the proceeds of the foreclosure sale have been applied in payment of them; if that is so, the holders of them always were, and still are, entitled to payment of them, in whole or in part, as the fund shall suffice for that purpose. The testimony of Wilson, Stanton, and Elliot fails to show that these bonds have been paid in whole, or in part, or that it is inequitable that they should be paid, as against Howard and the other appellees.

If the property mortgaged for the security of McCollum's bonds has been sold, and the proceeds brought into Court, and the fund now in the hands of the receiver, is a part of those proceeds—and it has already been shown that it is—then the lien of these bonds upon that fund seems to be clearly established, by the application of the commonest principles of equity in regard to the sale and distribution of the proceeds of mortgaged property, and they should be paid before the appellees are entitled to satisfaction of their claims, which never were liens upon the mortgaged property.

If it is objected that the mortgages securing McCollum's bonds, did not all of them cover all the property of the M. & M. Railroad Company, and that the property of that company was sold in distinct portions as it was mortgaged, whereby it is impossible to trace the fund now in Court as any part of the proceeds of any one or other of the mortgages, whereby there has become what is sometimes called a confusion of goods or property, and, therefore, Howard and others are entitled, either to share *pro rata* with the holders of those bonds, or to take the fund in preference to them, it is answered, that cannot be so, because, some

of his bonds were secured by a mortgage upon the whole line of the M. & M. Railroad Company, as will be seen by reference to the description of them in the amended bill, and besides, the road was sold for a round price of $5,500,000, and the Master's sale was only the machinery agreed upon for transferring the title and the mortgaged property, and the full consideration having been paid and distributed according to the terms of the agreements, except that portion now remaining in Court, being that portion assigned to the stockholders, such portion must be regarded as a part of the proceeds of the mortgaged property; and it is no concern of Howard and others, who never had any lien upon the property, how the proceeds are distributed between those who had. It is therefore contended upon this part of the case, that neither the letter nor the spirit of the agreement to which the C., R. I., & P. Railroad Company was a party, rendered it inequitable or improper for that company, or its director, to quiet the hostility of Durant to the arrangement, by purchasing his bonds, or having purchased them, to present them for payment, either in full, or *pro rata*, out of the fund now in Court, inasmuch as the case shows they never have been paid in any part. And so the only remaining question is, whether or not they shall be paid in full, if the funds in Court suffice for that purpose, or whether they shall share *pro rata* with all the parties who have presented claims to the Court, either as bondholders, judgment, or simple contract-creditors, and whose claims have been presented to the Circuit Court, and are now before this Court for consideration.

It is insisted that McCollum's bonds and coupons shall be paid in preference to the claims of Howard et al, upon their judgments, and simple contract debts, many of which, as will be shown by my brother Withrow in his argument,

are not due even yet, and may never become valid obligations against the property of the M. & M. Railroad Company, if the various cities and counties which issued the bonds guaranteed by the Company, shall perform, as it is now expected and understood they will, their duty to their creditors, by paying the bonds thus guaranteed.

The case has been argued thus far, upon the theory that, as a bondholder, McCollum's rights were paramount to those of Howard et al., because the funds in Court are the proceeds of property mortgaged to secure his bonds, together with others. The Circuit Court disallowed McCollum's claims, entirely, as will appear from the following paragraph of the decree. (Record No. 406, p. 132, fol. 403.) "The complainant, John V. McCollum, is not entitled to "the payment of any portion of the bonds and coupons "in said consolidated bill, and amendment thereto, de- "scribed, or to any portion of the same, out of the fund "now in the hands of the receiver in this cause, and that "the said consolidated bill, as to said John V. McCollum, "be, and is hereby, dismissed without prejudice to his "rights to recover on said bonds and coupons against the "defendants, the Chicago, Rock Island and Pacific Rail- "road Company, or other persons." Whatever may be the reasons for this conclusion of the Circuit Court, it is difficult to see why McCollum, as the holder of the bonds, described in his amended bill, is not a general creditor, even if he is not a creditor with a lien upon the funds in Court, as security for its payment.

It has been shown that neither he, nor any prior holder of his bonds and coupons, ever agreed to take the "scale" price for them. It has also been shown that it was not wrong for Dows to buy the bonds, in order to prevent Durant from frustrating the consummation of the

arrangement for a sale of the property of the M. & M. Railroad Company; and by assuming the duties and undertaking to discharge the obligations of the Stanton Committee, the C. R. I. & P. Railroad Company did not disable itself from asserting any claims of its own, or other parties, not inconsistent with those duties and obligations. No assenting bond or stockholder is before the Court, making complaint, that he has not, or will not receive his full share of the proceeds of that sale, according to the terms of the agreement; and if the C., R. I. & P. Railroad Company had remained the holder of the McCollum bonds, and was now presenting them, instead of McCollum, it is difficult to see how that would be, at all, inconsistent with its obligations and duties toward the assenting stock and bondholders. If they do not complain, and if there has been no breach of duty towards them, either on the part of the Stanton Committee, or of the railroad company that assumed the duties and obligations of that committee, then in equity, McCollum's bonds are in, and of themselves, a valid claim, as against the fund in Court, realized from a sale of the property mortgaged for their security. Suppose, however, that the bonds are no longer a lien upon the fund in Court—they still represent an indebtedness of the insolvent and defunct M. & M. Railroad Company, of as high a character in law, and prior in point of time, to the judgments which were recovered by Mark Howard and John Weber, against that company, as stated in record 344, pp 2, 3, fol. 6, 7, and certainly higher and older than the claims of Dow, Leconte and others, by simple contract of guarantee made by the M. & M. Railroad Company, as appears in record 344, pp. 92 to 105, inclusive.

Grant that the judgments of Howard and Weber established legal claims against the M. & M. Railroad Company, so does the production of McCollum's bonds, accompanied by proof, that they have never been paid, in whole or in part. Grant that Dow's and Leconte's claims, as holders of bonds guaranteed by the M. & M. Railroad Company, but which have not been reduced to judgment, are valid claims against the funds in Court—much more are the bonds of McCollum, with the coupons attached thereto, evidence of an older and better claim against the fund in Court. And, therefore, it is earnestly insisted that the decree of the Circuit Court was erroneous in denying McCollum any relief in this case, and it seems but an idle suggestion, which is contained in the clause of the decree cited above, that his bill is dismissed without prejudice to his rights to recover said bonds against the C., R. I., & P. Railroad Company, which, so far as this case shows, has never agreed to pay his bonds, nor become possessed of any fund or property liable for their payment, except the fund now in Court, in the hands of the receiver.

It is difficult to see why his claim is not as meritorious as are those of Foster, Bardwell, and McComb, who are allowed to come in and share in the fund, as general creditors, on an equal footing with Howard and others, complainants in the original bill. It will doubtless be claimed on behalf of the appellees, as it has been before, that by reducing their demands to judgment, and filing their bill, they obtained a preference over any other creditors who should come in afterwards; but this claim cannot be sustained, according to the decisions of this Court, in the cases of *Day et al* v. *Washburn et al*, 24 Howard, 352; *Wabash & Erie Canal Company* v. *Beers*, 2 Black, 448, and especially the case of *Dunham* v. *the Cin-*

cinati, etc., Railway Company, 1st Wallace, 254. The general principles in regard to this subject are stated with much fullness in "Story on Equity Pleadings," Redfield's Ed., 1865, sec's 199 to 206. See also *Pennock* v. *Coe*, 23 Howard, 117; 2nd Redfield on Railways, Ed., 1867, pp. 510-11 to 13.

When this case was before the Court at the last term, as appears by the report in 9 Wallace, p. 175, the Court decided that the claims of McCollum, Foster, Bardwell, and McComb, had not been determined nor affected by the litigation between the prior parties to the suit, and followed the decisions of *Wiswall et al* v. *Sampson et al*, 14 Howard, 52; and *Williams et al* v. *Gibbes et al*, 17 Howard, 257, in holding that, so long as there was a fund in Court representing the estate of an insolvent or deceased person, or corporation, all creditors of such person or corporation would be allowed to come in and present and prove their claims, and have them allowed full, or part, payment out of the fund, as the Court should deem just and equitable.

It is not worth while to extend this brief, which, it is feared, the Court may think is already too long, by an extended citation of authorities, or discussion of the legal principles, applicable to the case; the principles, and cases are quite familiar to the Court, and the profession. It is only a question of their application to the facts of the case. And we submit that, until it is shown by proof in the record, either that McCollum, or the prior holders or owners of his bonds and coupons, have agreed to take the "scale" price for them, or have been paid. in whole or in part, the amount due upon their bonds and coupons, they have, either as general or lien-holding creditors, a right to share in the fund now in the hands of the receiver.

If it shall be argued for the appellees, that the holders of these bonds are barred by lapse of time, because they were not presented within the time fixed for the presentation of such claims in the original decree of foreclosure, we reply, that, on reference to that decree, as it appears in record No. 344, p. 51, folio 149, two years was fixed as the period, from the date of said decree, within which "all "persons holding bonds and coupons secured by the said "mortgages, or either of them, shall present the same for "payment to said trustees, respectively, within two years "from the date of the sale under this decree. And in de- "fault of such presentation for payment, within said two "years, the holders of such bonds and coupons, not so pre- "sented, shall be debarred from all rights to have any "portion of the proceeds of the sale of said mortgaged "property applied in payment of said bonds and coupons."

By a subsequent clause of that decree, folio 150, it was ordered, "that the said several trustees, on receipt by them "of their respective shares of the proceeds of sale, should "give notice to the holders of bonds and coupons, en- "titled to share in the distribution thereof, to present their "bonds and coupons for payment of the amount to be paid "thereon by said trustees, at some place to be designated "in said notice, and that if not presented within the time "aforesaid, they will be barred, by publication in some "newspaper published in the city of New York, daily, for 10 days."

There is no proof in this record that the trustees ever gave that notice, or made the advertisement required by the decree. Therefore, no laches can be imputed to the appellant, McCollum, or any holder of the bonds, because no time has yet been fixed, within which they were required to

present them. Besides, it appears from the very terms of the decree, that limitation was fixed "for the purpose of "enabling said trustees to close their respective trusts," and so long as the trust is open and unsettled, and any part of the funds remain in Court, subject to its order, and no advertisement has been made, or is proved to have been made, for the presentation of the claims of the bondholders, there can be said to be no limitation or bar of their right to share in the distribution of the fund.

There does not seem to be any reason disclosed in this record, for charging or suspecting any of the parties to these protracted proceedings, of having been guilty of intentional fraud, or misconduct towards each other, or any other parties. It is the common case of different classes of creditors, struggling over the distribution of the proceeds of an insolvent estate, where the debtor is either dead, or hopelessly and irrecoverably bankrupt. In this case, the debtor was a corporation which has been substantially annihilated by the sale of its property and franchises. The fund in the hands of the receiver is all that remains of its property, liable to be applied to the payment of its debts. Among its creditors were included the bond-holders, judgment-creditors, and those having simple contract claims, and the fund will not suffice to pay them all.

I ask the particular attention of the Court to the character of the claims represented by the appellees, amounting in all to between $700,000 and $800,000, as shown in record No. 344, pp. 92 to 106, inclusive, and to the statements of my brother Withrow in his brief, as to the origin and nature of those claims. As to the greater part of them, including the judgments of Weber and Howard, it is clear that if the various counties and cities in the State

of Iowa, which issued the bonds which were guaranteed by the M. & M. Railroad Company, should pay their debts, then neither the M. & M. Railroad Company, nor the remnants of its estate now in the hands of the receiver, would be under any liability to any party holding those bonds. It is differ, ent with the claims of McCollum, for his bonds and coupons show a direct and primary liability of the M. & M. Railroad Company, not guaranteed by any other party, and he has no other place to look for payment of his claims than the fund in Court. If he is denied all remedy here, then, so far as this record shows, and as it is believed the fact is, he will be entirely without redress, because, after payment of the fund to the appellees, upon their claim, there will be nothing left of the estate of the M. & M. Railroad Company wherewith to pay his bonds, and no other party is shown to be liable, or to have any means likely to be applied to the payment of them.

It is believed to have been conclusively shown in this argument, that his bonds and coupons never have been paid; that no owner or holder of them ever agreed to take less than their face; that the Chicago, Rock Island and Pacific Railroad Company, in assuming the duties and obligations of the Stanton committee, did not debar itself from aiding the parties to carry out the arrangement for a sale of the property of the M. & M. Railroad Company, according to the terms of the agreement of October 20th 1865; that no party to that agreement, either stock or bondholder is here, objecting to the application of the fund in Court to the full or partial payment of the claims of McCollum and the other appellants; that if those claims are allowed against the fund in Court, it will not tend to disturb, in any degree, that arrangement, or limit or impair the rights of any party to it, and it seems inequitable to allow cred-

itors holding only such claims as those represented by the appellees, and who never had any lien or security upon the property of the M. & M. Railroad Company, to hinder or frustrate the distribution of the fund in Court among the holders of bonds which were secured by mortgages upon the property of the company.

If these views are correct, then the decree of the Circuit Court was erroneous in denying McCollum any share in the funds, in the hands of the receiver, and ought to be reversed, and he allowed either to come in as a general creditor, or, as has been strenuously insisted, as a lien holding creditor, entitled to full payment of his claim, if the fund in court shall suffice for that purpose.

For these reasons it is submitted that the decree of the Court below is erroneous, and ought to be reversed.

SAM'L W. FULLER,

Of Counsel for Appellants.

CHICAGO, April 11, 1871.

No. 181

Strong

In the Supreme Court of the United States.

JOHN V. McCOLLUM, *et al.*,
vs.
MARK HOWARD, *et al.*

Nos. ~~344~~ *and* ~~406~~ *as one Record.*

STATEMENT AND ARGUMENT ON BEHALF OF FOSTER, BARDWELL, AND McCOMB, APPELLANTS.

STATEMENT.

The Mississippi and Missouri Railroad Company, a corporation organized and existing under the laws of the State of Iowa, and owning and operating a railroad in said State, executed five mortgages conveying its entire property: "First, a mortgage and bonds on the first division of the road and machinery, from Davenport to Iowa City and Muscatine, for one million of dollars; a second mortgage and bonds on the same division for four hundred thousand dollars; a third mortgage on the Oskaloosa division, from Muscatine to Washington, for five hundred and ninety thousand dollars; a fourth mortgage and bonds on the division of the road from Iowa City to Council Bluffs, and

certain lands granted by Congress, called land grant or construction bonds and mortgage, for three million six hundred and twelve thousand dollars; a fifth mortgage and bonds, subject to the other four, on the whole road and appurtenances, for six hundred and ninety-one thousand dollars. On the twentieth of October, 1865, the interest on all these bonds had become due."

The Company became insolvent, and made default in payment of interest, and by the terms of the mortgages the entire debt became due and payable. A meeting of the bond and stockholders of the Company was held in the City of New York on the twentieth of October, 1865, to take into consideration the condition of the Company's affairs. Of the $3,612,000, first mortgage land grant bonds issued by the Company, $2,770,000 were represented; of the $1,000,000 first mortgage first division bonds, $120,000 were represented; of the $400,000 second mortgage first division bonds, $133,000 were represented; of the $590,000 first mortgage Oskaloosa division bonds, $151,000 were represented; of the $695,000 second mortgage construction bonds, $261,000 were represented; of $3,452,000 of stock, $1,167,500 were represented. The Mississippi and Missouri Railroad Company was not represented at said meeting; some of the officers of the company were present and were consulted as outside parties. The meeting "acted wholly and solely on its own behalf, and not for said company." (Deposition of John Elliott, Rec. No. 344, p. 67, fol. 192-6.) The meeting did not assume to act "for any stockholder not there represented, or for said Mississippi and Missouri Railroad Company." (Deposition of Blakeley Wilson and John Elliott, Record No. 344, pp. 65-71 inc.)

At this meeting various propositions were discussed. It was finally resolved "that a sale of the road to the Chicago and Rock Island Railroad Company is advisable," the proceeds to be divided according to the following scale:

1st mortgage, eastern division		$1,000,000	
Income bonds		214,000	
Interest July 1st, 1865		42,490	
			$1,256,490
2nd mortgage, eastern division, $400,000, @ 80 c.			320,000
Oskaloosa division bonds	$590,000		
Income do	73,000		
Ditto scrip	2,939		
	$665,939 @ 62½ c.		416,212
Land grant division bonds	$3,612,000		
Income do.	253,000		
Ditto scrip	12,550		
	$3,878,550 @ 70 c.		2,714,635
2nd mortgage construction bonds	$691,000		
Scrip	2,764		
	$693,764 @ 30 c.		208,129
Capital stock	$3,452,500 @ 16 c,		552,400
			$5,467,866

(Record, No. 344, p. 30.)

It was further —

Resolved, That a committee be appointed to arrange the mode and terms of payment with the Chicago and Rock Island Railroad Company, and the details of the sale authorized by this meeting; that Messrs. B. Wilson, G. W. Stanton and John Elliott be appointed such committee; and that said committee be instructed to make an arrangement with some trust company to receive the bonds and stock of the parties assenting, and issue certificates therefor, setting forth what the holder thereof is entitled to receive. (Record, No. 344, p. 32, fol. 92.)

The next step in the history of the case was the execution of a —

Memorandum of understanding had and agreement made, this first day of November, one thousand eight hundred and sixty-five, between the Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company, in pursuance of certain resolutions passed by a meeting of the bondholders and stockholders of the Mississippi and Missouri Railroad Company, held in the city of New York on the twentieth day of October 1865. (Record, No. 344, p. 36, fol. 104.)

The general nature of this agreement is stated in the first two articles:

ARTICLE I. The Mississippi and Missouri Railroad Company will take proper steps, with all possible dispatch, to cause the mortgages upon its line of road, its lands, depots, equipments, &c., &c., to be foreclosed, and its entire property, real and personal, sold, so that the purchaser shall be able to transfer a perfect and unincumbered title to such incorporated company in Iowa as the Chicago and Rock Island Railroad Company may designate to become the purchaser and owner thereof.

ARTICLE II. The Chicago and Rock Island Railroad Company will, within one year from December 1st, 1865, and as much earlier as the property aforesaid is so sold and purchased, cause to be incorporated a company in the State of Iowa, under the general law of said State, which shall purchase the said property for the sum of five millions five hundred thousand dollars, and complete the said road to Des Moines; and the Mississippi and Missouri Railroad Company agree that the person or persons who shall become the purchaser or purchasers under the foreclosures aforesaid shall sell the said property to such company or corporation for the sum and upon the terms herein stated and set forth.

The remainder of the contract relates principally to the details of the transaction contemplated in the foregoing articles. The sixth article is material in discussing one branch of the case, and is as follows:

ARTICLE VI. It is agreed that the Chicago and Rock Island Railroad Company shall have the possession of and operate the Mississippi and Missouri Railroad from and after the first day of December, 1865, as provided for in another agreement bearing even date with this, and that the interest upon the said sum of five millions five hundred thousand dollars shall commence on said first day of December, 1865, which interest shall be paid in cash at the time of the transfer of the property aforesaid shall be made to the company, as provided for in Article II.

On the same day another agreement was entered into, transferring the possession of the Mississippi and Missouri Railroad to the Chicago and Rock Island Railroad Company. (Record, No. 344, p. 38.)

As a part of this general arrangement, "an agreement between stockholders and bondholders of the Mississippi and Missouri Railroad Company and George W. Stanton, Jr., John Elliott and Blakeley Wilson, committee," was en-

tered into; by the terms of which the subscribing bond and stockholders ratified and comfirmed the authority granted by the meeting of October 20th to the committee, and surrendered their bonds and certificates of stock —

— into the hands of the Union Trust Company of New York, to be held by the said Trust Company as the agent of the said committee, and to be used as the said committee shall see fit in carrying out the sale and foreclosure aforesaid, with the proviso only that in case the said proceedings to foreclose shall fail of success, or the sale to be consummated, the said bonds and certificates of stock shall be restored to the subscribing holders, or those who through them have become entitled to them.

The committee on its part covenanted to use all—

—diligence in foreclosing the mortgages now encumbering the title of The Mississippi and Missouri Railroad Company to its property; to convey the same after such foreclosure, as more fully set forth in the agreement between The Chicago and Rock Island Railroad Company and The Mississippi and Missouri Railroad Company, hereinbefore referred to, for five millions five hundred thousand dollars, and to distribute the same among the holders of stock and bonds according to the following scale, viz: To the holders of bonds secured by the first mortgage of the eastern division of the Mississippi and Missouri Railroad, par, for principal debt and income bonds and interest accrued to July 1, 1865; to the holders of bonds secured by a second mortgage of the last mentioned division, eighty per cent. of the principal debt; to the holders of bonds secured by a mortgage on the Oskaloosa division and income bonds and scrip, sixty-two and a half per cent. of principal debt; to the holders of bonds secured by what is known as the land grant first mortgage income bonds and scrip outstanding, seventy per cent. of the principal debt; to the holders of bonds secured by the second construction mortgage so called and scrip, thirty per cent. of the principal debt; and to the holders of stock, sixteen per cent. of the par value of their shares; and to distribute the balance of purchase-money and the interest thereon at seven per cent. from Dec. 1st, 1865, if any remain after discharging the expenses of foreclosure and sale, among the holders of stock, and bonds according to the scale of apportionment hereinabove mentioned; the said committee agreeing to distribute among the said holders of stock and bonds the proceeds of the sale in the form in which proceeds are received, and to receive such proceeds only in the form of money or bonds secured by mortgage on the consolidated properties of the Chicago and Rock Island Railroad Company, and the Mississippi and Missouri Railroad Company, or of bonds secured by a mortgage on the property of the Mississippi and Missouri Railroad Company and guaranteed by the Chicago and Rock Island Railroad Company.

And the said committee further agree to receive through the Union Trust Company the bonds, scrip, and certificates of stock held by the parties assenting to this agreement; to deposit the same for safe keeping in the said Union Trust Company of New York, and to issue through it a proper receipt, which shall entitle the bearer to the rights of such bonds in the fund to be distributed under the terms and conditions hereinbefore mentioned.

(See Record, No. 344, pp. 39–40.)

On the 5th day of February, 1866, Thomas C. Durant, J. S. Wetmore and Robert B. Minturn, Jr., filed their bill in the Circuit Court of the United States for the District of Iowa, for the foreclosure of the mortgage executed to secure the bonds known as the second mortgage construction bonds. To this bill the mortgagor and the judgment creditors were made parties defendant. This suit was instituted under the direction and management of D. M. Hughes, F. P. James, and John P. Yelverton, representing an interest antagonistic to the Railroad Companies and the Committee above mentioned, known throughout these proceedings as the Stanton Committee.

By an amendment of the bill filed on the 9th day of May, 1866, the trustees named in the other mortgages upon the property of the Company, were made parties defendant.

(Record, No. 344, p. 151.)

The defendants to the original and amended bill answered; and those who were trustees in the other mortgages also filed cross bills praying a foreclosure of their several mortgages. Upon these pleadings issues were duly joined.

(Record, No. 344, pp. 160–228.)

Upon the issues thus joined a decree was entered on the 8th day of May, 1866, foreclosing all the mortgages, and ordering a sale of the mortgaged property in parcels as mortgaged, the payment of the proceeds to the trustees named in the mortgages, and the payment of the same by the trustees to the holders of the bonds and coupons secured thereby. (This decree will be found on pp. 45–53, Record No. 344.)

On the third day of July, 1866, at New York, "Ebenezer Cook, John F. Tracy, David Dows, Thomas F. Sturges and Oliver Charlick, of the first part, and George W. Stanton, Jr., John Elliott and Blakeley Wilson, committee, of the second part," entered into an agreement whereby the parties of the first part jointly and severally agreed and undertook that the Chicago, Rock Island and Pacific Railroad Company (a new corporation organized in Iowa), should purchase at a sum not exceeding five millions of dollars, the property of the Mississippi and Missouri Railroad Company, at the sale under the above mentioned decree of foreclosure, and hold it in trust to carry out in good faith the articles of agreement made between The Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company, of November 1st, 1865, and above mentioned. It was further agreed that if the party of the second part did not receive the $5,500,000 in money or bonds within three months from the 9th day of July, A. D. 1866, the said Chicago, Rock Island and Pacific Railroad Company should convey the property so purchased to the party of the second part. To this was appended a memorandum signed by John F. Tracy as President of the Chicago, Rock Island and Pacific Railroad Company, making upon the part of said Company the covenants entered into by the parties of the first part in this agreement. (Record No. 406, p. 40.)

At Davenport, Iowa, on the 9th day of July, 1866, (the day of the master's sale), the following explanatory clause was agreed upon, and signed by the Stanton committee:

"Whereas, the Chicago, Rock Island and Pacific Railroad Company have agreed to purchase the property of the Mississippi and Missouri Railroad Company, at the sale under the decree of foreclosure, and have agreed to pay Stanton, Elliott and Wilson, committee, five million five hundred thousand dollars, in bonds, as fully set forth in an agreement between said Company and said Stanton, etc., dated July 3, 1866:

"Now, we hereby declare the intent and meaning of said agreement to be, that we, the said Stanton, etc., committee, are to pay to the plaintiffs, the

trustees in the several mortgages, the amount of the bid that The Chicago, Rock Island and Pacific Railroad Company may make at said sale, and for such payment to the trustees so to be made by us are to receive from said company the said sum of five million five hundred thousand dollars, in manner and form as set forth in said agreement of July 3, 1866.

"Witness our hands, at Davenport, Iowa, July ninth, 1866.

"G. W. STANTON, JR.
"B. WILSON.
"JOHN ELLIOTT."

(See Record No. 406, p. 42.)

On the same day the property of the Company was sold by a special master, as directed by the decree of foreclosure, at Davenport, Iowa. The first division extending from Davenport to Iowa City and Muscatine, with the real estate, rolling stock and other property appertaining thereto, was sold to The Chicago, Rock Island and Pacific Railroad Company, for the sum of $1,000,000. The Oskaloosa division extending from Muscatine to Oskaloosa, with the appurtenant property was sold to the same purchaser, for the sum of $300,000. The lands embraced within the land grant to said company were sold to the same purchaser for the sum of $199,520. The division of the railroad from Iowa City westward, with the appurtenant property was sold to the same purchaser for the sum of $600,000. Other small parcels of land were sold for $480. The aggregate of the bids was $2,100,000. (Record 344, p. 236—240 inclusive.)

On the same day Mark Howard and John Webber filed the original bill in this case in the Circuit Court of the United States for the District of Iowa against the City of Davenport; The Mississippi and Missouri Railroad Company; The Chicago and Rock Island Railroad Company; George W. Stanton, Jr; John Elliott, and Blakeley Wilson; and The Chicago, Rock Island and Pacific Railroad Company; alleging substantially that complainants were judgment creditors of The Mississippi and Missouri Railroad Company, under judgments recovered upon its agreement of guar-

anty upon the bonds of the defendant, The City of Davenport, and other municipal corporations; that the $522,400 stipulated to be paid to the stockholders in accordance with the sale agreed upon at the meeting of the 20th of October, 1865, was corporate property, subject to the payment of the corporate debts of the company; and praying the application of so much as should be needed to the satisfaction of their judgments. The aggregate amount of their claims was $14,407.18.

On the 25th day of September, 1866, Joseph Young by Grant and Smith, solicitors of Howard and Webber, filed an amendment to the bill, praying to be made a co-plaintiff, and to be allowed to share in the distribution of the funds, upon the following claims:

1. Interest due on guaranteed bonds of Muscatine City, $65,265, principal to become due January 1st 1876, $97,000.

2. Principal and interest due on similar bonds of the City of Davenport, $8,425.

3. Interest due on similar bonds of Iowa City, $23,444, principal due January 1st, 1876, $35,000.

4. Interest due on similar bonds of Scott county, $17,000, principal due October 1st, 1868, $31,000.

5. Interest due on Muscatine county bonds, $36,676; principal due January 1st, 1874, $47,000.

6. An allegation that he is the owner of the bonds of like character against the several municipal corporations above mentioned, amounting to $400,000.

A copy of the guaranteed bond of the City of Davenport will be found in Record No. 344, p. 7, set out as an exhibit to the original bill. *It does not provide for the maturity of principal or interest upon any contingency before the dates named*—the interest to be paid semi-annually, and the principal on the 1st day of August, 1865. The guaranty is as follows:

In consideration that the City of Davenport has transferred to A. C. Flagg, treasurer, etc., the stock held by said city in the Mississippi and Missouri

Railroad Company, in trust, the said Mississippi and Missouri Railroad Company hereby guarantees to the holder of this bond *the payment of interest and principal, according to the terms thereof.*

In witness whereof, the president and treasurer of said company have hereunto signed their names and caused the seal of said corporation to be hereunto affixed this eighth day of September, A. D. 1853.

[SEAL.] JOHN A. DIX, *President.*
A. C. FLAGG, *Treasurer.*

A copy of the Iowa City bond will be found on page 12 of the same record—an exhibit to Young's petition. It contains no provision for maturing the principal before the 1st day of January, 1870, or of any coupons before the several dates fixed for their payment. The guaranty is as follows:

In consideration that the city of Iowa City has transferred to A. C. Flagg treasurer, in trust, the stock of the said city in the Mississipi and Missouri Railroad Company, the said railroad company hereby guarantees *the prompt payment of the interest as it matures, and the eventual payment of the principal of this bond.*

In witness whereof, by virtue of a resolution of the board of directors, the president and treasurer of said company have hereunto set their hands and caused the seal of said company to be affixed, at New York, this 20th day of August, 1856.

[SEAL.] (Signed) JOHN A. DIX, *Prendent.*
(Signed) A. C. FLAGG, *Treasurer.*

A copy of the Muscatine City bond will be found on page 13, same Record—an exhibit to the same petition. The principal of this bond matures on the 1st day of January, A. D. 1876, and the bond and and guaranty are in all other respects like the bond and guaranty of the Iowa City bond.

A copy of the Muscatine County bond may be found on page 14 of the same Record. An exhibit to the same petition. The principal matures on the 1st day of January, 1874. The bond in all other respects is the same as the bonds above referred to. The guaranty is as follows:

In consideration that the County of Muscatine has transferred to A. C. Flagg, treasurer, in trust, the stock of the said county in the Mississippi and Missouri Railroad Company, the said company hereby guarantees the prompt *payment of the principal of this bond.*

In witness whereof, by virtue of a resolution of the board of directors, the vice president and treasurer of said company have hereunto set their hands and caused the seal of said company to be affixed, at New York, this 26th day of September, 1854.

[SEAL.] EBENEZER COOK, *V. President.*
A. C. FLAGG, *Treasurer.*

A copy of the Scott County bond may be found on page 15 of the same Record. The principal matured on the 1st day of October, 1868. In other respects it is similar to the other bonds. The guaranty is similar to that on the bond of the City of Davenport.

The claims of Howard, amounting to about $12,000 are the only ones on which judgment has been recovered *against Mississippi and Missouri Railroad Company.*

The answer of the persons composing the Stanton Committee was filed on the 16th day of May, 1866. (Record No. 344, p. 18.) This answer alleges that the mortgage debt upon the road at the time the meeting of October 20th, 1865, was held, was about $6,400,000 principal, and nearly $500,000 matured interest; that "this debt was a lien upon the real estate of said company, which had preference and priority to any debt, demand or liability upon any alleged guaranty by said company of the obligation of any city, or other body or corporation." The committee in this answer set out their construction of the agreements above set out:

It was resolved and agreed by the persons present at such meeting that if the mortgage creditors and that the stockholders of said company would assent to, and interpose no delay, and raise no question as to the foreclosure of the mortgage upon said road, or the distribution of the proceeds thereof, and if the said road could be sold to the Chicago and Rock Island Company, or any other purchaser who would be willing to pay five and a half millions of dollars, and that amount should be realized ultimately from said property, it should be distributed in a certain order and ratio among the creditors of said company, holding its bonds, as aforesaid, and the said creditors, or such of them as assented to this arrangement, consented that if that amount was thus realized, the sum of five hundred and fifty-two thousand, five hundred dollars *should be relinquished by them, the said bondholders, rateably to be distribu-*

ted among the persons holding the stock of the said company. And these defendants say that until the said bondholders and mortgagees were paid and satisfied, no other persons had any legal or equitable claim on the road and property of the company, or upon any amount in any way proceeding therefrom, and that such allowance therefrom to the persons holding stock in said road was not a payment to said railroad company or corporation, but was a disposition by the bondholders and creditors aforesaid of money, to which no other persons had any claim or title, legal or equitable. (*Record No.* 344, *p.* 20, *fol.* 59.)

The Chicago, Rock Island and Pacific Railroad Company, answered, alleging that the certificates issued to stockholders upon the remainder of their stock, and which entitled the holder to receive portions of the $552,400 set apart for the stockholders had been transferred to persons who who were not parties to the suit, and who held the same as purchasers in good faith.

On the 23d day of October, 1867, George Bliss, Clark Durant, Charles W. Durant, William Elliott, Henry Van derveer, Robert Murray and Betsey Tracey, by James B. Edmonds their solicitor, presented their petition to the Circuit Court, alleging that they were holders of bonds of the same classes and of judgments for interest due, and praying to be allowed to come in and share in the distribution of the fund. They allege that "the complainants and defendants in the foregoing entitled cause have permitted one Joseph Young, a creditor on the same footing with" themselves, "without judgment against the said Railroad Company, to become a complainant therein, and since the last term of this court, to add the number and description of bonds owned and held by the other creditors of said railroad company, with a view to sharing pro-rata in the distribution of said fund, thereby delaying the bill in the foregoing entitled cause, so as to include the several bonds of all these creditors who filed bills in this court to reach the said fund, save and except the bonds of your petitioners, and also to include many bonds of other creditors upon which no judgments were rendered, and upon

which no bill was filed to reach said fund." (Record No. 344, p. 78, fol. 223.)

The plaintiffs Howard and Webber filed their answer to this petition, in which these allegations are not denied, but their effect is sought to be avoided by the following allegation:

"The counsel of Howard and Webber, and Young having received valuable assistance from the counsel of Le Conte and Nesbit, and having made their allegations for relief large enough to include the claims held by him, did invite the said counsel to transfer these claims to Young, so as to include them in his decree, and this they not only had the legal right to do, so long as the fund was sufficient, but it was their moral duty so to do." (Record No. 344, page 88, fol. 254.)

The cause came on to be heard on the 30th day of October, 1867, and the court entered an interlocutory decree, adjudging—

—that the sum of $552,400, agreed to be divided among the stockholders of the Mississippi and Missouri Railroad Company upon the sale of said railroad and its franchises to the Chicago and Rock Island Railroad, is a fund to be applied in the payment of the guaranteed debt by the Mississippi and Missouri Railroad Company, due and to become due to the plaintiffs, before any part thereof can be divided among the stockholders, and that said fund is to be divided among said plaintiffs Howard, Webber, and Young, and the interpleaders Bliss, Durant, Elliott, Vanderveer, and Murray, and to ascertain the amount due to each of said claimants, Ashabel Bennett, of Davenport, is appointed a master to report the number, amount, judgment, principal, and interest due, and principal not due, belonging to each of said claimants; and the defendants having alleged that of the said sum of $552,400 in bonds to be divided among the stockholders of said road, they had paid out the sum of $100,699 to bondholders, and for expenses connected with the execution of their trust under the sale, the said master is ordered to ascertain and report whether the same was paid out, and for what purpose, reporting each item in detail, and he is required to report on both of said subjects on or before the 1st of March next.

And as to the balance of said bonds, $451,703.93, of the Chicago, Rock Island and Pacific Railroad Company, so agreed to be paid to said stockholders, the interest on the sum of $552,400 from 1st January, 1866, to 1st July, 1866, at 6 per cent., and coupons for interest on $451,703.93 from 1st July, 1866, at 7 per cent., the said defendants are ordered adjudged and decreed to deliver the same to B. F. Allen, who is appointed a receiver to receive said moneys,

bonds, and coupons, collect the coupons now due, and as they become due and hold the said moneys, bonds, and coupons until the further order of this court. (Record No. 344, p. 86, fol. 249.)

On the first day of November, 1867, Howard, Webber, and Young filed their answer to the petition of Bliss, and others, to which reference is made above. (Record No. 344, p. 87, fol. 251.)

On the 13th day of February, 1868, the hearing commenced before the master, and on the 28th day of the same month the master filed his report. (Record No. 344, p. 89, fol. 257.)

On the 13th day of May, 1868, Douw, Lansing, Nesbit, and others filed their petition to be allowed to share in the distribution. It was ordered to be filed as of the third day of October, 1867. (Record No. 344, p. 79, fol. 229.) This petition was filed by the counsel of Le Conte and Nesbit, from whom "the counsel of Howard, Webber, and Young, had received valuable assistance," and for whose benefit the allegations of Young's petition were made "large enough to include claims held by him."

On the 9th day of June, 1868, the court entered the final decree, on the report of the master. (Record No. 344; p. 109, fol. 308.)

The court ordered, adjudged, and decreed "that the said Chicago, Rock Island and Pacific Railroad Company do pay over and deliver forthwith unto B. F. Allen, the receiver heretofore appointed in this case, the said sum of five hundred and forty-one thousand five hundred and twenty-seven dollars ($541, 527). which payment shall be made either in cash or in the bonds of said company constituting and being part of its bonds to the amount of nine million dollars ($9,000,000), bearing interest at seven per cent. per annum, payable semi-annually, and secured by first mortgage on the entire line of the railroad of said consolidated company, its franchises and depots, from Chicago to Des Moines and the Oskaloosa branch thereof, as provided by contract of sale between the said Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company, dated November 1st, A. D. 1865, which said bonds shall be taken and received in such payment at the par value of the principal sum secured to be paid thereby.

That upon so much of said five hundred and forty-one thousand five hundred and twenty-seven dollars ($541,527) as it shall pay to said receiver in

cash, it do fully pay to said receiver in cash interest from December 1st, A. D. 1865, at seven per cent. per annum, down to the time of such payment, and that on so much of said sum of five hundred and forty-one thousand five hundred and twenty-seven dollars ($541,527) as it shall pay in said bonds, it further pay to said receiver in cash, interest at said rate, from December 1st, A. D. 1865, to the day from which said bonds on their face bear or carry interest, and shall also pay in cash to said receiver the interest which shall at the time of such payment have accrued and become due on said bonds, from the day last aforesaid, as represented by the coupons attached to said bonds.

(Record No. 344, p. 110, folio 312.)

The decree then directs the manner in which the bonds shall be converted into money, the payment of costs, and then directs the receiver to—

—apportion the fund remaining in his hands among the said several complainants and claimants joining with them herein pro rata in proportion to the amounts of their said claims as ascertained by the said master's report herein, both matured and not matured, and which said amounts are as follows, to-wit:

(Record No. 344, p. 111, fol. 314.)

We present the amounts allowed to each claimant, with an analysis of the same, compiled from the master's report:

To Mark Howard:		
Judgment against the City of Davenport and terest		$4,404 22
(Record No. 344, pp. 105, 111.)		
To John Webber:		
Judgment against the City of Davenport and interest		10,002 50
(Record same as above.)		
To Joseph Young:		
Amount of bonds not due, (Record No. 344, pp. 100–105).	$226,000 00	
Judgment and interest thereon	223,853 60	
Interest due on bonds	101,000 00	
Bonds due, (Record No. 344, p. 105)	11,000 00	
		562,418 90
To Clark Durant:		
Bonds not due	$ 18,000 00	
Interest due	3,157 65	
Judgments and interest	15,403 28	
		36,560 93

(Record No. 344, p. 96.)

To Chas. W. Durant:

Bonds not due	$ 14,000 00	
Interest due on bonds	2,040 50	
Judgments	8,087 64	
		$24,128 14

(Record No. 344, p. 96.)

To Robert Murray:

Bonds not due	$ 6,000 00	
Interest due on bonds	1,041 96	
Judgments and interest	4,810 01	
		11'851 97

Record No. 344, p. 96.)

To Henry Vandeveer:

Bonds and interest due	$ 2,169 04	
Judgments and interest	6,468 88	
		8,637 92

(Record No. 344, p. 96.)

To William Elliott:

Bonds not due	$ 6,000 00	
Interest due on bonds	762 00	
Judgments and interest	4,497 68	
		11,259 68

(Record No. 344, p. 96.)

To George Bliss:

Bonds not due	$ 4,000 00	
Interest due on bonds	471 28	
Judgment and interest due	33,166 04	
		37,637 32

To Betsy Tracy:

Bonds not due	$ 19,000 00	
Interest on bonds	2,484 06	
		21,984 06

(Record No. 344, p. 96.)

To Harriet Le Conte:

Bonds not due	$ 2,000 00	
Bonds and interest due	15,798 57	
Judgment and interest	3,520 18	
		21,318 75

(Record No. 344, p. 99)

To Joseph W. Clark:

Bonds and interest not due	$ 6,500 00	
Bonds and interest due	3,558 12	
Judgments and interest	2,662 38	
		12,720 50

(Record No. 344, p. 99.)

To Douw & Lansing:

Bonds and interest not due	$ 8,000 00	
Bonds and interest due	9,389 30	
Judgments and interest	6,404 78	
		23,794 08

(Record No. 344, p. 99.)

To Margaret J. Nesbit::

Bonds and coupons due	8,272 60

To Jared F. Harrison:

Bonds and interest not due	$ 8,000 00	
Bonds and interest due	6,622 48	
		14,522 48

(Record No. 344, p. 99.)

The total amount of claims of all classes allowed was	$803,032 29
Those in the form of judgments amounted to	$323,280 00
Leaving as simple contract debts	$479,752 29

The actual amount of judgment indebtedness against the municipal corporations at the time the bills and petitions of intervention were severally filed, was $115,486.26: and the amount of simple contract indebtedness was $687,546.03 We submit in detail the basis for this statement, that it may be corrected if essentially erroneous.

On the 9th day of July, 1866, Mark Howard and John Webber filed the original bill.

Howard's judgment was for	$3,362 00
Webber's judgment was for	8,581 00

(Record No. 344, p. 105.)

Joseph Young filed his petition on the 25th day of September, and the following judgments allowed him were then in existence:

Clark vs. Muscatine County:

May 11th, 1865	$6,770 85	
May 16th, 1867	3,681 40	
Muscatine City—		
May 18th, 1867	3,116 00	
		$13,568 25

Charles W. Durant vs. Muscatine County:

May 16th, 1867	$5,272 33	
Iowa City—		
May 18th, 1867	2,305 00	
		$7,557 33

(Record No. 344, p. 94.)

Robert Murray vs. Muscatine County:

May 16th, 1867	$4,915 14

(Same Record.)

William Elliott vs. Muscatine County:

May 12th, 1865	$1,768 64	
October 18th 1867	862 64	
" " "	1,437 96	
		$4,069 24

(Same Record, pp. 77, 95.)

Against Muscatine City:

October 15th, 1864	$7,659 00
May 16th, "	5,256 76
" " "	3,857 74
" " "	9,095 00
Costs	50 00

(Record No. 344, pp. 9, 103.)

City of Davenport:

May 11th, 1866	3,094 03	

(Same Record, pp. 10, 105.)

Iowa City:

May 15th, 1865	3,470 67	$32,483 20

George Bliss, Clark Durant, C. W. Durant, Robert Murray and William Elliott filed their petitions on the 3d day of October, 1867, and on that day the following judgments allowed them were in existence:

George Bliss vs. Johnson County:

May 12th, 1866	$25,427 00	
Iowa City—		
May 16th, 1867	4,708 00	
		$30,135 00

Harriet Le Conte, Joseph W. Clark, Douw & Lansing, filed their petitions as of the 3d day of October, 1867 (Record, No. 344, p. 79), and on that day the following judgments allowed them were in existence:

Harriet Le Conte vs. The City of Davenport:

May 9th, 1866	$1,970 00	
The City of Muscatine—		
May 12th, 1864	1,028 25	
		$2,998 25

(Same Record, pp. 78, 97.)

Joseph W. Clark vs. The County of Scott:

October 19th, 1865	$2,284 00

(Same Record, pp. 78, 98.)

Douw & Lansing vs. Muscatine County:

October 24th, 1864	$2,032 00	
May 10th, 1865	1,573 50	
" 16th, 1867	1,907 35	
		$5,512 85
Total judgment indebtedness		$115,486 26

The analysis also shows that of the entire amount allowed, but $487,009.81, including judgments and simple contract indebtedness was due; and that of the amount allowed, $316,022.48 was not due and its payment could not be enforced against the principal debtors.

The master's report also shows that $99,252.62 was allowed on account of past due interest on the bonds of Muscatine County, not a dollar of which was guaranteed by the Railroad Company. (See copy of guaranty, *supra*, p. 10.)

We extract from the decree the further order material on this appeal:

And it is further adjudged and decreed that the shareholders of the Misissippi and Missouri Railroad Company who would be entitled to a distribution of said fund according to the agreement of November 1st, 1865, and subsequent agreements between the stockholders and bondholders of The Mississippi and Missouri Railroad Company, be, and they are, subrogated to all the rights, claims and remedies of the parties plaintiff respectively, in and upon each and all of such judgments, coupons and bonds, as and when the same shall be so paid in full, against the several municipal corporations which are the principal debtors on such bonds and judgments; that such judgments shall remain in full force and effect against such corporations for the benefit of said shareholders, who may enforce the collection of the same in the name of the plaintiffs therein or otherwise, but at their own costs and charges, by any process, remedy or proceeding which said plaintiffs might have had for their own benefit; that any and all proceedings which may have been instituted by any of said parties for the collection of said demands shall remain and inure to the benefit of said shareholders, who shall be entitled to hold and continue the same in their own behalf, and to this end, the plaintiffs respectively, on the payment of such judgments by the receiver, shall execute, acknowledge, and deliver to him an assignment of each judgment so paid, and the receiver shall, on the payment of the same, deliver to the lawfully constituted and authorized trustees or agents of said shareholders such assignments of said judgments, and shall also deliver to them all coupons and bonds which shall have been paid in full as above directed.

And it is further ordered, adjudged and decreed, that if after payment in full to any of said parties by said receiver of all sums which said party shall be entitled to have paid to him out of said fund, according to the directions hereinbefore given, there shall remain in said receiver's hands any portion or residue of the proportion of said fund set apart and appropriated to such party as hereinbefore directed, the same shall be reported by said receiver to the court and held subject to such further order and direction as may be made by the court in respect to the disposition thereof (Record No. 344, p. 113, fol. 318, 320.)

From this decree the defendants, Stanton, Elliott, Wilson and The Chicago, Rock Island and Pacific Railroad Company appealed to this court. The decree below was affirmed. (See 7 Wall. 392.)

While the appeal was pending, one of the appellants in this appeal, Frederick A. Foster, presented his petition to the Circuit Court of the United States for the District of Iowa, alleging that he was the owner of ten "land grant division bonds," with coupons attached; that said bonds

and coupons had not been paid; that neither he nor those who held said bonds were parties to the arrangement or agreement of the 20th October, 1865, and that they have never assented to or approved the same; that "the plaintiffs in this cause, being general creditors of the Mississippi and Missouri Railroad Company, having no lien upon the property of said company, or upon the proceeds arising from the sale thereof, by virtue of being holders of its mortgage bonds or of judgments against it prior to the mortgage above recited, filed their bill in this cause, praying the application of said fund to the payment of their claims against said company;" that he had not in any "manner relinquished or waived his rights to payment in full of said ten bonds, and of all moneys due thereon out of the proceeds of said sale; that petitioner was not a party to the action when the decree in this cause was entered; and that he was entitled to receive payment of his bonds in full from said fund." Other averments are set out as a basis for the prayer that the distribution of the fund be delayed by order of the court, but they are no longer material to the questions remaining in the case. The petition prayed the court to—

—make an order restraining the distribution of said fund, and directing that upon proper pleadings to be filed in this court, an issue be joined between this petitioner and the other holders of said bonds who have never assented to said agreement and arrangement, and the complainants and intervenors herein to determine and settle the priorities of the rights of the parties to an application of said fund. (Record No. 344, pp. 129–132).

On the 29th day of October, 1868, leave to file this petition was granted, and it was thereupon ordered "that the distribution of the fund by the receiver in pursuance of the decree, be suspended until the determination of the appeal taken from the decree to the Supreme Court." (Record, 344, p. 248, fol. 724).

On the 10th day of April, 1869, John V. McCollum, by

Scammon, McCagg and Fuller, his solicitors, filed his petition alleging —

"That he is the owner and holder of eighty-four (84) bonds of one thousand ($1,000) each, and three bonds of five hundred dollars ($500) each, representing and amounting in all to the sum of eighty-five thousand five hundred dollars ($85,500.00), issued by the Mississippi and Missouri Railroad Company, a corporation created under and by virtue of the laws of the State of Iowa, together with the coupons attached to said bonds, some of which are long since past due, and others not yet due; and that he is also the owner and holder of coupons to the amount of twenty-eight thousand dollars ($28,000), which were attached to other bonds issued by said railroad company, and which are all past due and wholly unpaid, and the originals of said bonds and coupons this petitioner will present and prove in this court as the court may hereafter require.

The remaining allegations are substantially the same as those set out by Foster, and the prayer is:

"That upon the final hearing of this cause, this court will order, direct, and decree that the aforesaid bonds and coupons belonging to this petitioner shall be first paid to him, together with all arrearages of interest thereon, out of the funds now in this court, or under its control in the hands of B. F. Allen, receiver, before any part of said fund shall be distributed and paid to any of the other parties to this suit, and the proceedings therein now pending in this court, together with his legal costs in this behalf.

And may it please your honors to grant unto your petitioner such other and further relief in the premises as in justice and equity he shall appear entitled to." (Record, No. 344, p. 250, fol. 729, 732.)

On the 15th day of April, 1869, J. Bardwell, by Polk, Hubbell & Barcroft, his solicitors, filed his petition in said court, stating the history of the mortgages executed by The Mississippi and Missouri Railroad Company, the arrangement for the sale of the bonds, the sale, the decree in the main case herein, and that "at the time of making said alleged agreement by a portion of the bond and stockholders of said company, he was, and ever since has been, and still is the owner of five of the bonds of said company, secured by the mortgage executed by said company on the eighth day of May, A. D. 1857, one bond of the class designated as income bonds, and one bond issued by said company secured by said mortgage of said company, exe-

cuted on the tenth day of December, 1861, as hereinbefore stated, with the several coupons thereto attached, and that there is now due to him thereon the sum of about nine thousand dollars, and that he is entitled to the payment thereof out of the money in the hands of the receiver in this cause, according to the priorities of the several mortgages by which they were secured as aforesaid;" that he was not a party to this suit or to the appointment of the Stanton Committee. The prayer is substantially the same as in the petition of McCollum. (Record, No. 344, p. 253, fol. 739–749.)

On the same day Henry S. McComb filed in his petition in said cause, with allegations substantially the same as in the petition of Foster, McCollum and Bardwell, and describing his demand as a bond for the sum of five hundred dollars, and a receipt for interest coupons secured by mortgage to the amount of $252.50. (Record, No. 344, p. 259.)

On the 11th day of May, 1868, the *procedendo* of this court were filed in the Circuit Court. (Record, No. 344, p. 256, fol. 750.)

On the 20th day of May, 1868, the defendants, Elliott and Wilson, by Grant, their solicitor, filed in said cause the following paper:

"Now come the trustees named in said decree, and file their assent to the payment of the bonds and coupons not due according to the decree, and they also file a request of a majority of the stockholders to continue them in their trust, and move the court to add to the former order of this court that the receiver deliver to said trustees, or a majority of them, on their order the judgments, coupons and bonds which may be paid out of the sixteen per cent dividend of the stockholders referred to in the decree." (Record, No. 344, p. 265, fol. 777.)

On the 20th day of May, 1869, the court entered a decree granting to Foster, McCollum, Bardwell and McComb leave to file their several petitions, "and that they have until July Rule Day to file a bill consolidating their claims, and set-

ting up more specifically their claims now on file;" and ordering that thereafter the case should proceed upon said bill as in other causes in chancery; that the receiver set apart $200,000 of the fund in his hands and refrain from distributing the same; and that he proceed with the distribution of the remainder under the original decree. From that part of the decree ordering a distribution the petitioners appealed to this court. (Record, No. 344, p. 267, fol. 781.) This appeal has been dismissed by this court, but the record therein by stipulation is made a part of the record on this appeal. (Record, No. 406, p. 41, fol. 433.)

On the fifth day of July, 1869, Foster, McCollum, Bardwell and McComb, by their solicitors, filed in said court their consolidated bill, in accordance with the order of the court. (Record, No. 406, p. 1, fol. 2.)

An amendment to this bill was filed on the sixth day of December, 1869, correcting mistakes occurring in the description of the coupons claimed by McCollum. On the 21st day of July, 1869, the original and intervening complainants filed their answer to the original consolidated bill, and by stipulation this was treated as an answer to the bill as amended. (Record, No. 406, pp. 11–27.)

The Chicago, Rock Island and Pacific Railroad Company answered: replications were filed and issue duly joined. (Record, No. 406, pp. 23, 24.)

The allegations of the consolidated bill as to the mortgages and the foreclosure suit are admitted. The issues joined by the pleadings may be thus stated:

1. The consolidated bill alleges that the aggregate amount bid at the foreclosure sale —

— was the sum of two millions one hundred thousand dollars, but the actual amount agreed to be paid for said property was the sum of five millions five hundred thousand dollars; that the amount bid was nominal merely, the real agreement and understanding by and between the parties being that the purchaser should pay for the title acquired thereby the said sum of five millions five hundred thousand dollars; that the said sum of two millions

one hundred thousand dollars bid at said sale was not paid, but the trustees in whose favor the decree of foreclosure was entered, gave a receipt to the officer conducting the sale for the amount without actual payment, the same being treated as part and parcel of the said sum of five millions five hundred thousand dollars which it had been agreed should be paid for said property; that said trustees have never had in their own hands any of the moneys arising from said sale, but that all disbursements which have been made to the holders of bonds entitled thereto have been made by the Chicago, Rock Island and Pacific Railroad Company, and applied on the said sum of five millions five hundred thousand dollars, agreed as aforesaid to be paid for said mortgaged property. (Record, No. 406, p. 4, fol. 12.)

To this is responded a denial, except as to the allegation that no payment was made by the purchaser to the officer conducting the sale, which is admitted with the allegation that the payment was made by or on behalf of the purchaser to the trustees. (Record, No. 406, p. 13, fol. 42.)

The following portions of the pleadings and evidence in the record bear upon this issue:

Original Bill of Howard & Webber,
(Record, No. 344, p. 6, fol. 16.)
Deposition of John Elliott,
(Record, No. 404, p. 43, fol. 141.)
Deposition of George W. Stanton, Jr.,
(Same Record, p. 46, fol. 151, 152.)
Deposition of Blakeley Wilson,
(Record, 406, p. 48, fol. 158, pp. 51, 52, 53, 57, fol. 187, 59.)

2. It is further alleged in the consolidated bill —

That on or about the 20th day of October, 1865, and prior to said fore closure and sale, an arrangement was made and entered into by and between some of the holders of bonds of each of the series which had been issued by the Mississippi and Missouri Railroad Company and some of the stockholders of said railroad company, in which it was agreed that a portion of the proceeds to be realized from the sale of said property as above alleged, and which of right was applicable in the payment of the bonds and matured coupons, should be withheld from such application, and be improperly applied to the payment to the stockholders of said company sixteen per cent of the par amount of the stock in said company, while the holders of

the several series of bonds to which the bonds now held by your orators belong should receive less than the par amount then due and unpaid thereon, according to a scale at the time agreed upon; that they or neither of them have never assented to or approved of the same, and that the several bonds, coupons and scrip which they severally hold, nor any part thereof, are in any manner by the agreement of the holders thereof or otherwise, subject to the same; that many of the holders of said bonds of said several series have accepted of the sums provided for the payment of the same by the said agreement and scale; that neither your orators nor any one holding the bonds and coupons and scrip which they now hold, have accepted said sum in payment of the same; that they have never relinquished or in any manner waived their right to demand payment of the same in full; that pursuant to said agreements a portion of the proceeds of said sale, amounting to nearly five hundred and fifty thousand dollars, and now amounting with the accumulations of interest to over six hundred thousand dollars, has been set apart to the payment of the said sixteen per cent to the holders of the capital stock of said railway company, (Record, No. 406, p. 5, fol. 13.)

Each of these allegations is denied by the answer. (Record, No. 406, p. 14, fol. 47, 48.)

1. As to the foreclosure and sale —

See Howard *vs.* Webber, Original Bill,
(Record, 344, p. 4, fol. 11.)
Answer of the Stanton Committee,
(Same Record, 20, 21, fol. 58 to 64, inc.)
The proceedings of the Stockholders' Meeting, Same Record, pp. 25 to 33 inc.
Contracts between the Railroad Companies,
(Same Record, pp. 36–38.)
The Peter Myers Agreement,
(Same Record, p. 39.)

2. As to the relation of the complainants to these proceedings —

The original bonds and coupons are in evidence. Stipulation,
(Record, 406, p. 37, fol. 121.)
Stipulation.
(Same Record, p. 140, fol. 42.)

Deposition of Foster and McComb,
(Record, 406, pp. 115, 126, inc.)

3. The consolidated bill alleges and the answer denies that the fund in the hands of the receiver, Allen, is a part of the proceeds of a mortgage sale. (Record, No. 406, p. 15, fol. 49.) As showing the position of the parties, and the ruling of this court on this question heretofore, we call the attention of the court to the —

Deposition of John Elliott,
(Record, 344, p. 65, fol. 195.)

Deposition of B. Wilson,
(Record, 344, p. 65, fol. 188, 189.)

Answer of Wilson and Elliott to Original Bill,
(Record, 344, pp. 20, 21, fol. 59, 60, 63.)

Printed argument of Cook & Drury in this cause on first appeal, p. 4.

Printed argument of James Emott in same case, p. 7, dis. 7.

4. Frederick A. Foster represents that he is the owner and holder of ten of the construction bonds above described, being the bonds numbered 60, 61, 62, 63, 64, 65, 622, 623, 625, 1031, with the coupons attached to each bond numbered from 16 to 40, inclusive; that there is now due to him from the Mississippi and Missouri Railroad Company the principal of said bonds and the matured coupons on each; that the principal of said bonds and the last-mentioned coupons remain wholly unpaid; that neither himself nor any prior owner and holder of said bonds and coupons has waived payment of the full amount of said bonds and matured coupons; that he has never made or assented to any arrangement or agreement that said bonds or coupons, or any of them, should be satisfied or discharged as valid and binding obligations of said railroad company by the payment of any less sum than the full amount of principal and interest matured thereon. (Record, 406, page 5, fol. 17.)

These allegations are denied by the answer. (Same Record, p. 15, fol. 50.)

5. Similar allegations are set out in the bill touching the claims of Bardwell, McCollum, and McComb (same Record, pp. 5–7), and are denied by the answer (same Rec-

ord, p. 15, fol. 49, 51). The defendants further allege that the bonds, coupons and scrip claimed by these parties are the property of The Chicago, Rock Island and Pacific Railroad Company.

6. The consolidated bill alleges —

—that, by reason of the premises, they are severally entitled to have their bonds, coupons, and scrip aforesaid paid out of the funds now in this court or under its control, realized from the sale of the property and franchises of said company, as hereinbefore alleged; that such payment should be made to your orators before anything is paid to the complainant and intervenors in this cause or any claims represented in this cause by the Chicago, Rock Island and Pacific Railroad Company, George W. Stanton, Jr., John Elliott and Blakeley Wilson, inasmuch as said bonds, coupons, and scrip are, as your orators are informed, advised, believe and allege, prior to any and all of the claims represented by the complainants, intervenors, and defendants herein. (Record, No. 406, p 7, fol. 23.)

These are denied by the answer. (Record, No. 406, p. 16, fol. 54.)

7. As a further defense, the defendants allege as to the foreclosure sale:

The trustees of all the other mortgages came into this court; a foreclosure and sale was decreed in May, 1866; the property was sold in separate parcels as heretofore set out, one million for the first division, three hundred thousand dollars for the Oskaloosa division, and eight hundred thousand on the first or land grant construction mortgage, and nothing on the second construction or last mortgage. The Chicago, Rock Island and Pacific Railroad Company became the purchaser. The Chicago and Rock Island Company as herein stated, paid the purchase-money, and thus all the title and claim of the holders of all classes of bonds became extinguished. The sale was affirmed by a decree of this court, and an order made that the trustees in the mortgages should give notice to the bondholders that if they did not claim their share of the foreclosure sale in two years from the day of sale their rights were to be barred, and the fund which otherwise belonged to them was to be paid over to the other bondholders. This notice was duly given, and the claims of the bonds now represented by Foster and others as a lien on said road, or proceeds of sale, barred forever. (Record, No. 406, p. 15, fol. 60, 61.)

These allegations are denied by a general replication. As to the publication of such notice, there is no evidence in the record.

8. The answer further alleges that there is a fund now in the hands of The Chicago, Rock Island and Pacific Railroad Company, "applicable, if they are entitled to it, to the claims of the non-assenting bondholders, and more than sufficient to pay all non-assenting bonds and interest." (Record, 406, p. 20, fol. 66,)

These allegations are denied by a general replication.

9. The defendants further answering "set up as matter of law, against the claims of Foster and others —

1st. That they have no lien on the fund in court as mortgagees, the mortgage property being sold, the proceeds delivered to their trustees, and they must look solely to them for the money; their time has elapsed, their right barred.

2d. They have no lien on the fund in court, because it was derived from the private sale of the assenting stock and bondholders, not from the foreclosure, and no bondholder has any right to any part of it unless he assents thereto.

3d. They have no right to come in as general creditors and divide the fund with Howard and others, because they, by superior diligence, must be first paid. They have no right to it as general creditors at all, because the fund was raised by the act of a large majority of assenting stock and bondholders for the benefit of all the bondholders and stockholders alike, and it was provided that it should be divided solely among those assenting; the bondholders for whose benefit it was made can not, by refusing to assent to its terms, get more money than those who did assent, and thus obtain more of the fund without such assent than those who did assent.

4th. The funds now in the hands of the Chicago, Rock Island and Pacific Railroad Company is sufficient to pay the whole claim of the plaintiffs, if they have any.

And these defendants having fully answered said bill, pray the same may be dismissed. (Record No. 406, p. 20, fol. 66–67).

The prayer of the consolidated bill was:

That upon the final hearing your honors will order, direct and decree that the aforesaid bonds, coupons and scrip belonging severally to your orators shall be first paid to them, together with all arrearages of interest thereon, out of the fund under the control of this court and in the hands of B. F. Allen, receiver, as aforesaid; that if the court shall find that your orators are general creditors only of the said Mississippi and Missouri Railroad Company, having no lien upon said fund prior to that of the complainants and intervenors herein, that the court will order, direct and decree that they share pro rata with said complainants and intervenors

in the distribution of said fund, or of the proceeds thereof, upon the same terms and basis; and that your orators severally have such other, further or different relief in the premises as to the court shall seem meet." (Record, No. 406, p. 7.)

10. The defendants filed an amendment to the answer on the 29th day of October, 1868, setting up an additional defense that the Chicago, Rock Island and Pacific Railroad Company not only are the owners of said bonds and coupons claimed by said Foster, McComb, Bardwell, and McCollum, but they have in writing agreed to pay the same, "and these defendants ask that this court, in any final order as to such of said bonds as the parties may show that they have title, the said Chicago, Rock Island and Pacific Railroad Company may be ordered to pay the same, as well as the costs arising out of this bill of intervention." (Record, No. 406, p. 27, fol. 88.)

Upon the trial of these issues the court below entered the decree which will be found in Record No. 406, pages 31–36.

From this decree Foster, Bardwell, McComb and McCollum appeal, the first three complaining because their claims were allowed by the court below only as those of general creditors, and the last because his was refused entire.

The original complainants and defendants appeal, complaining of the decree because it allows the claims of Foster and his co-plaintiffs, even as general creditors, and because it orders that the subrogated fund be held subject to the payment of the debts of the Mississippi and Missouri Railroad Company.

ARGUMENT.

I.

The complainants in the consolidated bill claim a lien upon the funds in court upon the ground that it is the proceeds of the sale of property, mortgaged to secure the payment of their bonds. They claim further, the existence of this lien whether the funds be proceeds of a private sale or a sale in foreclosure. No distinction seems to be made in the cases cited between private and foreclosure sales. The ground upon which the lien attaches is, that the fund takes the place of the property mortgaged. If the sale was, as we claim, a foreclosure sale, there can be no question as to the existence of the lien.

Furness vs Catterham Railroad Co., 27 Beav.
McLaren vs Brewer, 51 Me. 402.
Willmarth vs Bancroft, 10 Allen, 348.
Thompson vs Perkins et al, 3 Mason 238.
Codwise et al vs Gelston et al, 10, Johnson, 528.
Williams et al vs Gibbs et al 17, Howard 257.
Pennock et al vs Coe, Trustee, 23 Howard 117.

The opinion of this court on the former appeal in this cause settles the question as to the character of the sale. It was not a private sale by the bond and stockholders. They did not own the road unless they acquired a title to it by the foreclosure sale. If they thus acquired the title, it ceased to be corporate property, and when it was sold to the Chicago, Rock Island and Pacific Railroad Company, the purchase money was subject to their disposition. Being thus under their control it is difficult to see why any portion of it could become corporate property by being given to the bondholders. This line of defense, however, was presented by the the Stanton Committee in their answer to Howard and Webber's original bill, but it was

rejected by both the court below and by this court. The original decree in this case, affirmed by this court, can be sustained only upon the theory that the fund in controversy is a surplus remaining to the debtor corporation after applying the proceeds of a foreclosure sale to the payment of the mortgage debt

It was urged on the hearing below that the "road was sold under foreclosure in parcels corresponding to those embraced in the respective mortgages, the $5,500,000 was the price agreed to be paid for the whole road as an entirety without any reference to the value of the several divisions;" that the complainants are general creditors as to the proceeds of the divisions not covered by their mortgages, and that as it cannot be determined how much proceeded from the foreclosure of our mortgages we shall be deemed only general creditors as to the entire fund. It is a sufficient answer to say:

1. That no general creditor is prejudiced by recognizing our lien upon the fund, as he loses nothing upon which he gave credit to the mortgagor; that to deny our lien is to deprive us of the security upon which we gave credit, and to deprive us of it without fault or neglect upon our part; that it being shown that the fund is not sufficient to pay the entire mortgage debt no general creditor is prejudiced by its application to the payment of any mortgage debt.

2. That the court can by reference or in some other suitable manner ascertain the actual value of the several divisions of the property sold and upon that basis apportion the entire proceeds of the sale; or it may apportion the proceeds upon the basis of the nominal bids at the sale; that such a proceeding can work no prejudice to the general creditor, while it secures to the bondholder the benefit of his security.

3. That the claims of Bardwell, McComb and McCollom consist in part of bonds secured by a mortgage extending over the entire property, and that as to that portion of their claims there can be no question as to priority.

II.

The proposition that the proceeds of the sale were delivered to the trustees in the mortgages is not sustained by the evidence and has no foundation in fact. The evidence shows clearly that no money was ever paid to the trustees by either the master who conducted the sale or the purchasers of the property. It is true that the report of the master shows a payment evidenced by vouchers executed to him by the trustees, but, in fact, the only payment made to them was a surrender of the bonds held by the Stanton Committee as the agents of the assenting bond holders. No money has been placed in the hands of the trustees for the bondholders who did not assent to the arrangement for the sale of the road. It is true that the Stanton Committee entered into a contract with the Chicago, Rock Island and Pacific Railroad Company by the terms of which the latter undertook to pay to the trustees the full amount due them under the sale, but it also appears that no such payment was ever in fact made. It further appears that the Stanton Committee have repudiated said contract and are seeking to reclaim the consideration which supported said covenant. But if the court shall be satisfied from the evidence that the purchase money paid for the road either at a foreclosure or a private sale made by the company itself was $5,500,000 instead of $2,100,000, and that but a portion of the amount paid has been paid to the trustees, it will order the application of the entire fund, if necessary, wherever found, to the payment of the mortgage debt.

III.

In the court below, and in the argument of the demurer to the return of the alternative writ of mandamus, in this court at the last term, the original complainants and intervenors relied with great confidence upon the proposition "that the Circuit Court had no power after Howard *et al* had by their superior dilligence procured the payment of this fund into court, and a decree for its distribution to themselves as creditors of the M. & M. Company, and after

affirmance of that decision in this court, to open it to let in other creditors, having no superior rights, to reap the benefit of complainant's exertions." The ruling of this court in that case disposes of the question of power. We assume, however, that it will be claimed that a court of equity will as a rule recognize the paramount lien of the judgment creditor who first files his bill to reach equitable assets of the debtor.

Conceding, for the purposes of argument, the soundness of the rule and its application to this case, we answer:

1. That by virtue of the mortgage executed to secure the payment of our bonds, we had a specific lien upon the property, the sale of which produced this fund, and the lien attached to the fund as soon as it come into existence, and is paramount to that of any general creditor, whether by judgment or simple contract.

2. The facts developed by the record give to the original complaints and intervenors no superior equities, under the rule they claim, though we are but general creditors the rule claimed has never been held available by any one but a judgment creditor of the party whose property is sought to be applied, and available to him only after he has exhausted his remedy at law by causing an execution to be issued upon which there is a return of *nulla bona*. A judgment and execution with such a return, or a state of facts which would render such a return to an execution, if issued, inevitable, and the filing of a bill in equity to reach equitable assets has been held by many courts to give a priority over creditors who many thereafter come in and claim a share in the distribution of such assets. Is that the case at bar? None of the petitions of intervention allege the recovery of any judgments by any of the parties against The Mississippi & Missouri Railroad Company, whose property is to be distributed. In the original bill the complainant Howard alleges that he has recovered a judgment of three thousand five hundred and sixty-two and 50-100 dollars, and costs against the city of Davenport and the Mississippi and Missouri Railroad Company; and John

Webber alleges that he has recovered a judgment against both of the said parties for the sum of eight thousand five hundred and eighty-one dollars, debt, and twenty-eight and 90-100 dollars, costs. The intervening complainant, Joseph Young, alleges the recovery of several judgments against the counties and cities whose bonds he holds, but no where intimates that he holds any judgment against The Mississippi and Missouri Railroad Company. Some of the other intervenors allege that judgments have been recovered against the counties and cities, but none of them claim any judgments against the railroad company. The only judgment creditors of the railroad company who appear in the pleadings are Howard and Webber, and the aggregate amount of their judgments, including costs, is $12,220.61, with the accrued interest. All other claims against this fund were, at the time of the commencement of the suit, and so far as shown by the record, are now, simple contract demands.

The rule upon this point was very clearly stated by Mr. Justice NELSON in *Day et al vs Washburn et al*, 24 Howard, 355. The language of a portion of the opinion is so directly in point that we copy it:

"The Court of Chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors and thus defeat a pro rata distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a Court of Chancery will enforce (2 John., ch. 283; 4 Ib., 691.

The two firms, therefore who filed the bill—the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors.

"Indeed, the principle upon which the bill seems to have been drawn, and is now sought to be sustained, would preclude any preference in favor of the appellants—which is, that the debtor's property, in the hands of the assignee, constituted a fund for the benefit of creditors, which a Court of Equity only could reach, and hence that the creditors had a right to the interposition of the court, without first obtaining a judgment and execution. It is true, where a

specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a Court of Chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund pro rata among all the creditors, unless preference is given in the pledge or assignment of the fund. In the present case, as the assignment was made to Keith, in trust for the benefit of the creditors, if the bill had been filed to enforce the trust, no judgment or execution would have been necessary, as preliminary steps to the interposition of the court; but in that case the appellants would not have been entitled to a preference, as none was given to them in the trust deed, but the contrary."

Nearly all of the authorities cited in the court below for the original complainant and intervenors in this case in support of this proposition were submitted to the court by counsel for the appellant in that case. In this case, if The Mississippi & Missouri Railroad Company had possessed millions of property subject to execution, not one dollar of it could have been seized for the satisfaction of these claims, because no judgment had been rendered against the company.

Not only were the claims of the original complainants and intervenors simple contract debts as to The Mississippi & Missouri Railroad Company, but of the $803,032.29 allowed, and ordered to be paid out of this fund, $316,022.48 were not then due. The indebtedness was upon bonds and coupons issued by counties and cities providing for the payment of the principal and installment of interest at particular times named, and without any provision for the maturity of the principal by the non-payment of any installment of interest. The liability of the railroad company is upon a guaranty of these bonds. The guaranty upon the bonds of the city of Davenport and of the County of Scott was of "the payment of interest and principle according to the terms thereof." Upon these bonds no judgment could be recovered, either against the principal debtor or the guarantors for principal or interest not matured. The guaranty upon the bonds of Iowa City was of "the prompt payment of the interest as it matures, and of

the eventual payment of the principal of this bond." The guaranty on the bonds of the city of Muscatine was in substantially the same language. This guaranty rendered the guarantor liable for the payment of interest at its maturity, if not paid by the principal, and for the payment of the principal debt after a failure to collect the same by process of law as against the principal debtor. As to the unmatured portion of this debt, no judgment had been or could be recovered against either principal or guarantor. As to the bonds of Muscatine County, the case is still stronger, the contract of guaranty was for the payment of the principal of the bonds alone. The railroad company is not now and never can be made legally liable for the payment of the interest on these bonds, and yet that interest constitutes a part of the claim allowed, to the amount of about $100,000. At the time this decree was entered no judgment could have been received against either principal or guarantor for the principal debt. In this connection let it be remembered that these claims are all founded upon contracts of guaranty; that the principal debtors are municipal coporations; that the payment of the principal is being enforced under the judgments of this court, while the claims of Foster and his associates are the debts of the insolvent company and must be paid from this fund if they are paid at all; that the $316,022.48 not due may be paid by the principal debtor at the date of its maturity, and that as against such debtors its payment cannot be sooner enforced.

Upon what principal of equity can Howard and Webber, having judgments amounting to about $12,000, be entitled to satisfaction out of a fund amounting to about $600,000; and be permitted to claim not only a payment of their judgments before the payment of other claims, because of their superior diligence, but also assert the right to parcel out to other parties having claims by simple contract the right to come in and share in the distribution of the fund to the exclusion of other creditors of the same class—the consideration of such

arrangement being the "valuable assistance" which their counsel has received from the counsel of the favored claimants. When Howard and Webber are paid the full amount of their judgments, have they any lien upon or interest in the fund remaining in the hands of the court? After they have received the amount of their judgments, may they say to Joseph Young, "you are represented by the same solicitor who represents us, and for that reason you may come in and share in the fund remaining after we have been paid;"—to Harriet Le Coute and her associates "your counsel has rendered our solicitor valuable assistance which entitles you to share in the distribution of the fund remaining after we are paid;"—to George P. Bliss and his associates, "your claims are of the same class as Young's and Le Coute's, but inasmuch as you have not employed our solicitor, and your counsel has omitted to render him valuable assistance, you shall not share in the distribution of the fund:"—to Foster and his associates "while your claims must be paid from this fund, if they are paid at all, you have sinned as did Bliss and his associates, and shall not be permitted to share in the distribution." May they do even more than this—may they exclude creditors whose claims are mature and admit to payment guaranteed debts not due and the payment of which cannot be enforced against the principle—may they exclude claims which must be paid, if paid at all, from this fund, while they admit claims to the amount of $100,000, upon which the railroad company is not now and never was liable either as principal or guarantor?

IV.

It is alleged in the answer that the evidence discloses in the hands of the defendant, The Chicago, Rock Island and Pacific Railroad Company, a fund sufficient for the payment of the complainants' entire demand. To this we answer: —

1. We are entitled to payment out of the fund in court, and will not be denied such payment, because we might en-

force our claims against another fund not under the control of the court.

2. That the fund, if any, in the hands of the Railroad Company, applicable to the payment of our claim, is so on the theory that it is a part of the proceeds of a sale of the mortgaged property, and that we are entitled to payment out of the fund in court by the same right.

3. That the evidence shows that the fund alleged to be in the hands of the Railroad Company, if a trust fund, should be paid to other parties who are not now before the court. The contract of November 1st, 1865, spoken of as the "Peter Myers' agreement," provided expressly that any surplus of the $5,500,000 remaining after paying to the different bondholders and stockholders the several amounts to which they would be entitled under the scale therein set out and the expense of executing the trust, should be distributed to the subscribers to that agreement. The complainants in the consolidated bill were not subscribers to that agreement, and cannot share in the distribution of the fund thereunder. The other fund which it is claimed is in the hands of the Railroad Company, resulted from a reservation of one-third of the interest agreed to be paid by the Railroad Company to the holders of the Trust Company's certificates issued under the Peter Myers agreement. This interest was reserved by an arrangement entered into between the Railroad Company and each of the individual parties entitled to receive the same. In no event can any non-assenting bondholders claim that they are entitled to any payment out of the fund, if the transaction was within the rule prohibiting a trustee from speculating in the subject matter of his trust.

The fund thus accruing would belong to the parties who are entitled to receive the interest relinquished, and not to these complainants.

4. If there is a fund in the hands of The Railroad Company which may be properly applied to the payment of our claims, the court cannot, under the existing state of the pleadings, decree such payment against the company. The

pleadings consist of the consolidated cross bill filed by Foster, Bardwell, McCollum and McComb, praying the application of the funds in the hands of the court to the payment of their several claims; the answer of the original complainants, original intervenors and the original defendants, and general replications. To enter a decree adjudging that we are entitled to payment out of any fund in the hands of the Railroad Company, would be granting relief not prayed for in any bill or cross bill, and in the absence of any issue triable between parties most deeply interested in the result. If the defendants to the consolidated bill desired payment of our claims out of the fund in the hands of the Railroad Company, they should have filed a cross bill tendering an issue to the company and making a proper prayer for relief. No opportunity has been given to the company to try the question presented. It is true that in the amendment to the answer, the defendants to the cross bill ask that "as to any final order as to the bonds the complainant may show they are entitled to, that The Chicago, Rock Island and Pacific Railroad Company may be ordered to pay the same," but, upon a request preferred in an answer by one defendant other defendants could not join issue, and it cannot be made the basis of a decree.

V.

In the ninth division of the decree of foreclosure (Record No. 344, p. 51, fol. 150,) it is ordered and decreed that all persons holding bonds or coupons secured by the mortgages foreclosed, shall present the same for payment to the trustees within two years from the date of sale, under that decree; that in default of such presentation within said two years, the holders of such bonds or coupons not so presented shall be debarred from all rights to have any portion of the proceeds of the sale of said mortgaged property applied in the payment of said bonds and coupons. The several trustees were ordered and directed on receipt by them of their respective shares, to give notice to the holders of the bonds and coupons entitled to share in the distribution thereof, to present their bonds and coupons for pay-

ment of the amounts to be paid thereon, at some place designated in said notice, and that they would be barred by a failure to so present—such notice to be given by publication in some newspaper published in the City of New York, daily, for ten days. In the answer and in the court below it was stoutly contended that this provision in the decree of foreclosure completely cut off the complainants in the consolidated bill from any payment out of the proceeds of the foreclosure sale. To this we answer:—

1. That this decree declares upon its face that said order was made "for the purpose of enabling said trustees to close their respective trusts;" that it was designed only for the protection of the trustees against the claims of the parties who might delay the presentation of their bonds until after the settlement of the trust, and that it never was intended to bar any claim against the fund while it remained in the hands of the trustees or the court.

2. That there is no evidence in the Record showing, or even tending to show, that the notice required to be given by the trustees to the bondholders was ever given in the manner directed by the terms of the decree, or in any other manner. If the bondholders could be barred from asserting their claims against the funds in the hands of the trustees, or of the court, under any circumstances, they cannot be barred in the absence of such notice.

VI.

By the original decree it was adjudged that "the shareholders of The Mississippi and Missouri Railroad Company who would be entitled to a distribution of the said fund according to the agreement of November 1st, 1865 * * * * * and who would have been entitled to the same fund but for the claims of the creditors of said Mississippi and Missouri Railroad Company, be, and they hereby are, subrogated to all the rights, claims and remedies of the parties plaintiffs respectively in and upon each of the judgments, coupons and bonds paid by the application of the fund in the hands of the receiver." And it is further ordered that the receiver shall, upon the payment of the

same, deliver to the lawfully constituted and authorized trustees or agents of said shareholders "the assignments, the judgments, the coupons and bonds." None of the parties then before the court complained of this order. Foster and his associates were not before the court, and are not bound by it. It was not made the ground of complaint or discussion on the appeal from the original decree, and stands affirmed by the general decree of affirmance of this court. In the decree made on the hearing of the consolidated bill, the order to the receiver was made more specific, directing him to proceed to collect the subrogated judgments, bonds and coupons, and report from time to time the amount in his hands, declaring that it should be applied to the payment of creditors as long as any remained unsatisfied, and when all creditors were paid, it should be distributed to the shareholders.

It is now alleged that the original decree was reversed by the court below without any application being made therefor. The consolidated bill contains a general prayer for relief. The complainants in that bill sought complete payment of their demands. Under the view of the court, they were entitled to share only as to a portion of their claims with the original complainants and intervenors *pro rata*. The claims allowed to the original and intervening claimants amounted to over $800,000 with accrued interest. The fund in the hands of the receiver amounted to about $650,000, reduced by costs and expenses. There not being sufficient funds in the hands of the court to pay Foster and the other new parties the full amount found due, the court, under this general prayer, ordered that the subrogated fund be applied to the payment of debts remaining unsatisfied after the application of the funds now held by the receiver.

If it was competent to give the parties any relief, it was competent to give them this. The original decree did not order the payment of the subrogated fund to the stockholders free and discharged of the rights of creditors; and if it did it would not bind the new intervenors to any greater extent than did the decree directing the payment of the

original fund to the original complainants and intervenors. Inasmuch as the decree permitting the new intervenors to share with the original parties in the fund now on hand reduced the shares which the original parties would have otherwise received, it was equitable that they should be permitted to share with the new parties in the distribution of the subrogated fund, which, like the original fund, was applicable to the payment of all the debts of the company. It is difficult to understand why Mark Howard, John Webber and Joseph Young, with their intervening co-complainants complain of a decree which provides for the payment in full of their demands, instead of about sixty per cent. thereof. They occupy the anomalous position of appellants complaining of a decree which applies the corporate property of this bankrupt and defunct corporation to the payment of one hundred instead of sixty per centum of their claims. They are aggrieved by the order of the court directing that their claims shall be paid in full, and are now asking this court to so modify the decree of the court below as to order that the subrogated fund, a portion of which should be paid to them in common with the other creditors, shall be paid instead to the stockholders of the company. So persistent are they as to their rights in the original fund, that they are unwilling that other creditors shall even share it with them—so generous are they as to the subrogated fund, that they insist upon giving it all to the stockholders, relinquishing their own right to share in it, and insisting that other creditors shall also relinquish theirs.

The subrogated fund is corporate property, and as such is appliable to the payment of corporate debts. This court has declared such to be the character of the original fund. This fund being applied to the satisfaction of the liabilities of the company on contracts of guaranty, the subrogated fund consists of the claims of the creditor against the principal debtor paid by the guarantor, and in which the guarantor is entitled to be subrogated to the rights of the creditor against the principal debtor. That the subrogated fund takes the place of the original fund, and is charged with any liabilities which could be asserted against the

original fund, cannot be for a moment questioned. If the original fund was corporate property, so is the subrogated fund. If the original fund was liable for the payment of corporate debts, so was the subrogated fund. If the rights of the stockholders in the original fund were subject to the rights of creditors, the rights of the former as to the subrogated fund are under the same subjection.

It is evident that the original decree contemplated further orders and directions. The fund is to be paid to the lawfully entitled agents and trustees of the shareholders. Who are they? The officers of the company or the Stanton Committee? And if it is claimed that the Stanton committee are the trustees or agents of those who assented to their appointment, who represent the non-assenting stockholders? Shall the receiver determine these questions at his peril? If he cannot, will the court by further directions, determine them for him?

THO. F. WITHROW,

Counsel for Foster, Bardwell and McComb.